FILE COPY

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 99

UNITED STATES OF AMERICA, APPELLANT,

vs.

BRICKLAYERS, PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION OF AMERICA, AFL; BRICKLAYERS, PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION OF OHIO, AFL; BRICKLAYERS, PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION OF TOLEDO AND VICINITY, AFL; BRICKLAYERS, PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION OF COLUMBUS, OHIO, LOCAL NO. 1, AFL; BRICKLAYERS, PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION OF DAYTON, OHIO, LOCAL NO. 24, AFL; BRICKLAYERS, PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION OF CLEVELAND, OHIO, LOCAL NO. 7, AFL; BRICKLAYERS, PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION OF CINCINNATI, OHIO, LOCAL NO. 1, AFL; AND FRANK WILLIAM SALERNO

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

FILED JUNE 30, 1949

PROBABLE JURISDICTION NOTED OCTOBER 10, 1949

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 440

UNITED STATES OF AMERICA, APPELLANT,

vs.

EMPLOYING PLASTERERS ASSOCIATION OF CHICAGO, JOURNEYMEN PLASTERERS' PROTECTIVE AND BENEVOLENT SOCIETY, LOCAL No. 5 O. P. & C. F. I. A. AND BYRON WILLIAM DALTON

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

INDEX

1-3 In United States District Court, Northern District of Illinois, Eastern Division

CIVIL ACTION

No. 52 C 1640

Equitable Relief Sought

UNITED STATES OF AMERICA, PLAINTIFF,

v.

EMPLOYING PLASTERERS ASSOCIATION OF CHICAGO; JOURNEYMEN PLASTERERS' PROTECTIVE AND BENEVOLENT SOCIETY, LOCAL NO. 5, O. P. & C. F. I. A.; AND BYRON WILLIAM DALTON, DEFENDANTS

COMPLAINT—Filed July 31, 1952

The United States of America, by its attorneys, acting under the direction of the Attorney General, brings this complaint against the defendants named herein, and alleges as follows:

I

JURISDICTION AND VENUE

1. This complaint is filed and these proceedings are instituted against the defendants named herein under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended (15 U. S. C. Sec. 4), entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, in order to prevent and restrain continuing violations by the defendants, as hereinafter alleged, of Sections 1 and 2 of that Act (15 U. S. C. Secs. 1, 2).

2. The defendants Employing Plasterers Association of Chicago, Journeymen Plasterers' Protective and Benevolent Society, Local No. 5, O. P. & C. F. I. A., and Byron William Dalton, as hereinafter alleged, maintain offices and transact business within the Eastern Division of the Northern District of Illinois and are found therein.

4 II

DEFENDANTS

3. The following are named as defendants herein:

(a) Employing Plasterers Association of Chicago, a corporation organized and existing under the General Not-for-Profit Corporation laws of the State of Illinois, with its

place of business and offices in Chicago, Illinois. Said corporation, sometimes hereinafter referred to as the "Association," is a trade association whose membership consists of 39 plastering contractors doing business in the Chicago area;

(b) Journeymen Plasterers' Protective and Benevolent Society, Local No. 5, O. P. & C. F. I. A., sometimes hereinafter referred to as "Local 5," an unincorporated trade union or association of individuals chartered by and operating under the authority of the Operative Plasterers and Cement Finishers International Association of the United States and Canada. Local 5 has its place of business and offices in Chicago, Illinois. The membership of Local 5 consists of approximately 1200 journeymen plasterers and plasterers' apprentices who perform substantially all of the plastering work in the Chicago area;

(c) Byron William Dalton, who resides at 1245 North Shore Avenue, Chicago, Illinois. Byron William Dalton is president of Local 5 and was business agent of such local for many years prior to becoming president.

4. Whenever in this complaint it is alleged that the Association or Local 5 did any act or thing, such allegation shall be deemed to mean that such act was done by the respective officers, employees, agents, or representatives of the Association or Local 5.

5 III

CO-CONSPIRATORS

5. Numerous plastering contractors in the Chicago area, including those plastering contractors who are members of the Association, were co-conspirators in the combination and conspiracy hereinafter alleged.

IV

DEFINITIONS

6. As used herein, the term "plastering contractor" means an independent entrepreneur who is engaged in the business of entering into and performing contracts for the furnishing of plastering materials and the installation thereof in buildings. Such contracts are normally made with general contractors or builders. Plastering contractors function as managers and owners of businesses and employ journeymen and apprentice plasterers to perform plastering work.

7. As used herein, the term "Chicago area" means that area within the recognized jurisdiction of Local 5. It includes Chicago, Illinois and most of the remaining area of Cook County, Illinois.

V

Nature of Trade and Commerce

8. There are approximately 140 plastering contractors in the Chicago area who are engaged in the business of performing plastering contracts, which involve the furnishing of plastering materials and the installation thereof in buildings. In performing said contracts, said contractors sell and distribute plastering materials, as well as performing the services of installing the same, and said contracts include a charge for the plastering materials as well as the services in the installation thereof. The dollar volume of the plastering contracts entered into by the plastering contractors in the Chicago area in 1951 amounted to more than $25,000,000.

9. Approximately 39 of the above referred to plastering contractors in the Chicago area are members of the defendant
6 Association. The dollar volume of plastering contracts entered into by plastering contractors who are members of the defendant Association totalled in excess of $15,000,000 in 1951, or 60% of the total amount of plastering contracting business in the Chicago area in that year.

10. The materials, herein referred to as plastering materials, supplied by plastering contractors in the performance of plastering contracts, include gypsum, vermiculite, perlite, gypsum lath, metal lath, lime, cement, cornerites, corner beads, channel irons, and tiewire. A major part of all of said plastering materials used in the performance of plastering contracts in the Chicago area is produced in States other than the State of Illinois, and is shipped in interstate commerce from said States into the Chicago area for sale and installation therein.

11. Customarily, the plastering materials sold and installed by plastering contractors in the Chicago area are purchased from building material dealers in the area who purchase said materials from out-of-State sources for resale to said plastering contractors and other customers. Substantial quantities of said plastering materials are purchased from out-of-State sources by said building material dealers in response and pursuant to prior orders placed with said dealers by plastering contractors, and, upon receipt of said materials from said out-of-State sources, said materials are then delivered to the plastering contractors who ordered the same.

12. Substantial quantities of plastering materials purchased by plastering contractors in the Chicago area are obtained from building material dealers who have in turn secured said materials from out-of-State sources in order to meet the regular anticipated demand of said plastering contractors. Said plastering materials purchased by such dealers from out-of-State sources to meet the regular anticipated demands of said plastering contractors move in a continuous

flow in interstate commerce from said out-of-State sources to the plastering contractors.

7 13. Substantial quantities of plastering materials purchased by plastering contractors through building material dealers are obtained from manufacturers, dealers, or other sources outside the State of Illinois who ship directly to the job site or place of business of said contractors in the Chicago area where they are utilized by the plastering contractor in performing plastering contracting work. Said plastering materials sold and installed in the Chicago area flow in a continuous, uninterrupted stream from their origin in States other than the State of Illinois to the site of their installation and use in buildings and other structures in the Chicago area.

14. Consumers of plastering materials ordinarily do not install said materials, and this service is customarily performed by plastering contractors, who employ and supervise skilled labor for this purpose. The service performed by plastering contractors in the Chicago area in distributing, selling, and installing plastering materials, is an integral part of, and necessary to, the movement in interstate commerce of plastering materials which are manufactured in States other than the State of Illinois and which are distributed, sold, and installed in the Chicago area. Thus, plastering contractors are conduits through which plastering materials manufactured and shipped from States other than the State of Illinois are sold and distributed to the consuming public in the Chicago area. Said plastering materials flow in a continuous, uninterrupted stream from their points of origin in States other than Illinois to their places of installation and use in buildings in the Chicago area.

15. The plastering operation is an integral part of the building construction industry, which, in the Chicago area in 1951, engaged in new building construction and remodeling to the value of approximately a half billion dollars, and the performance of said plastering operation is necessary to the completion of other building operations, including interior painting and decorating and the installation of plumbing fixtures, heating and air conditioning outlets and

8 vents, electrical outlets and fixtures, flooring and interior wood trim, and window and door sashes. A substantial part of all of said building materials and appurtenances is produced in States other than Illinois and is sold and shipped in interstate commerce from said States to the Chicago area for distribution and use in buildings in said area.

16. The installation or use in buildings of said building materials and appurtenances is an integral part of, and necessary to, the movement in interstate commerce of said materials manufactured in States other than the State of Illinois and which are distributed,

sold and installed in the Chicago area. Substantial quantities of said building materials and appurtenances flow in a continuous uninterrupted stream from their points of origin in States other than Illinois to the places of installation and use in buildings in the Chicago area.

17. Any restraint upon or disruption in or interference with the performance of plastering work in the Chicago area necessarily and directly restrains and affects the interstate flow of plastering materials, and also constitutes a direct and substantial burden and restraint upon the interstate flow of all said other building materials and appurtenances entering into the construction of buildings in the Chicago area.

18. There are a number of large plastering contractors located outside of the State of Illinois who engage in performing plastering contracts in many states and who specialize in large construction jobs such as housing projects, office buildings, hospitals, and government buildings. In the performance of such contracts, said contractors, from their respective home offices located in States other than Illinois place orders for the shipment of building materials to job sites in different states, transport plastering mechanics and supervisory employees to said job sites, enter into arrangements for financing of their operations, and exercise control and supervision over the performance of said contracts
9 in other states. Said companies are engaged in interstate trade and commerce, and any restraint upon or interference with their ability to enter into or to perform plastering contracts in the Chicago area constitutes a restraint upon interstate trade and commerce.

VI

Combination and Conspiracy

19. Beginning in or about 1938, and continuing to the date of the filing of this complaint, the defendants and their co-conspirators, and others to the plaintiff unknown, have engaged in an unlawful combination and conspiracy to suppress competition among the plastering contractors in the Chicago area, and to restrict and exclude persons from engaging in the plastering contracting business in said area, in unreasonable restraint of the hereinbefore described trade and commerce among the several States, and to monopolize the interstate commerce as hereinbefore described in the sale, distribution and installation of plastering materials utilized in the Chicago area in the performance of plastering contracting work, in violation of Sections 1 and 2 of the Act of Congress of July 2, 1890, as amended (15 U. S. C. Sec. 1 and 2), commonly known as the Sherman Act. Said offenses are continuing and will continue unless the relief hereinafter prayed for in this complaint is granted.

20. The aforesaid combination and conspiracy has consisted of a continuing agreement and concert of action among the defendants and their co-conspirators, the substantial terms of which have been that they agree:

(a) That no person or firm be permitted to engage in business as a plastering contractor in the Chicago area without first securing the approval of Local 5 and the defendant Byron Dalton;

(b) That the defendant Local 5 refuse to allow its members to work for any plastering contractor who has not received the approval of Local 5 to enter into or to engage in
10 the plastering contracting business;

(c) That no person or firm approved by Local 5 and the defendant Byron Dalton as a plastering contractor shall thereafter change its form of business organization without first securing the approval of the said defendants;

(d) That none of the members of the defendant Association perform plastering contracting work on any job with respect to which the general contractor has an unresolved dispute with another plastering contractor;

(e) That defendants Local 5 and Byron Dalton aid in the enforcement of the agreement referred to in (d) above, by instituting work slowdowns and other harassing tactics;

(f) That out-of-State plastering contractors be excluded from engaging in the plastering contracting business in the Chicago area;

(g) That Local 5 institute work slowdowns and otherwise harass and intimidate any out-of-State plastering contractor who engages in the plastering business in the Chicago area.

21. During the period of time covered by this complaint and for the purpose of effecting the aforesaid combination and conspiracy, the defendants and their co-conspirators, by agreement and concert of action, have done the things which, as hereinbefore alleged, they conspired to do, and more particularly have done, among others, the acts and things hereinafter described.

22. For many years past, the defendant Local 5 has maintained and enforced rules and regulations which require that any person who wishes to become a plastering contractor in the Chicago area must first appear before a special Contractors Examining
11 Board established by Local 5 and composed exclusively of officers and members of that Local. The approval of that Board is a prerequisite to the ability of any plastering contractor to secure union labor in the Chicago area, or to perform plastering contracts on union jobs. Local 5 requires that a prospective plastering contractor must have been a member of Local 5 for at least five years before his application to engage in the plastering con-

tracting business will be considered. The defendant Local 5 has denied to numerous persons the right to enter the plastering contracting business in the Chicago area and has denied that right particularly to persons who have not been members of Local 5 for five years.

23. No plastering contractor in the Chicago area who has not first received the approval of the special Contractors Examining Board established by Local 5 can employ journeymen plasterers and apprentices who are members of Local 5, with the exception that plastering contractors who were in the business prior to the inception of this conspiracy have been permitted to employ members of Local 5 and to remain in business.

24. No plastering contractor in the Chicago area is permitted to alter the membership or management of his firm or organize as a corporation without first applying for and securing the approval of Local 5. Plastering contractors who have made such management changes without the prior approval of Local 5 have been subjected to penalties and fines imposed by Local 5.

25. For many years past, the defendant Association and Local 5 have had incorporated into a joint agreement a so-called "original contractor" rule. Under such rule, plastering contractors in the Chicago area, including the members of defendant Association, agree to and are required to boycott and refuse to enter into plastering contracts with any general contractor on any job on which another plastering contractor has started work or has received a contract unless the original plastering contractor gives his approval to the substitution of the contractor. The rule forces general con-
12 tractors who may have a dispute with their plastering contractor to accede to the demands of the original plastering contractor by preventing the general contractor from securing the services of a different plastering contractor.

26. This "original contractor" rule is enforced by work slowdowns against any plastering contractor violating the rule, and fining and intimidating union members who work for plastering contractors who are violating the "original contractor" rule.

27. When a general contractor has attempted to escape the effect of the "original contractor" rule by contracting with out-of-State union plastering contractors to do plastering work in the Chicago area, the defendants have harassed and intimidated such out-of-State plastering contractors in order to insure adherence to the "original contractor" rule.

28. Defendants have systematically followed the policy of preventing and discouraging all out-of-State union contractors from seeking or performing plastering contracts in the Chicago area by work slowdowns, fines on union labor, intimidation, and by other means. Defendants have been so successful in excluding out-of-State plastering contractors from the Chicago area by use of tactics such

as those described above that no out-of-State plastering contractors have undertaken to perform plastering contracts in the Chicago area for nearly twenty years, except for one veterans hospital, one federal housing project, and one State hospital.

VII

Effects

29. The effects of the aforesaid combination and conspiracy, among others, have been as follows:

(a) The right of out-of-State plastering contractors to come into the Chicago area and perform plastering work has been unlawfully restrained and impeded.

13 (b) Competition among plastering contractors in the Chicago area has been unlawfully restrained, and the traditional American right of a person to enter into a business of his own choice without hindrance by illegal restraints of trade has been impaired and thwarted.

(c) The flow in interstate trade and commerce of building materials used in the building industry, including materials used by the plastering industry, has been unlawfully restrained

(d) The cost of building construction in the Chicago area has been artificially and illegally increased.

(e) The public has been denied the benefits in the construction industry in the Chicago area which would result from competition free from illegal restraints in the plastering phases of the building construction industry.

Prayer

Wherefore, plaintiff prays:

1. That the Court adjudge and decree that the aforesaid combination and conspiracy entered into by the defendants and all the acts done pursuant thereto constitute an unlawful restraint of interstate trade and commerce in violation of Sections 1 and 2 of the Sherman Act.

2. That the defendants and each of them, and their directors, officers, and agents, and employees, be enjoined from continuing, renewing or reviving the unlawful combination and conspiracy hereinbefore alleged, or any combination or conspiracy having a similar purpose or effect.

3. That the defendants and each of them be enjoined from continuing in effect, or maintaining or enforcing the so-called

14 "original contractor rule" or restriction or any other rule or restriction having a similar purpose or effect.

4. That the defendants Byron Dalton and local 5 be ordered to dissolve the so-called special Contractors Examining Board and

that the defendants and each of them be hereafter enjoined from creating or maintaining or taking part in the creation or maintenance of any other board or group which takes action or makes recommendation for the purpose or with the effect of excluding persons or firms from engaging in the plastering contractors business, or which takes action or makes recommendation for the purpose or with the effect of determining or passing upon the qualifications of any person or company to engage in the plastering contracting business; provided, however, that the judgment entered in this cause shall not prohibit Local 5 from entering into agreements with existing or prospective plastering contractors relating to wages, hours, and other legitimate terms of working conditions.

5. That the defendants be enjoined from adopting, maintaining, or enforcing any rule or restriction, or taking any action, having the purpose or effect of preventing or restricting members of Local 5 or any other persons from engaging in the plastering contracting business.

6. That the defendants and each of them be enjoined from harassing, intimidating, hindering, or preventing any out-of-State plastering contractor from submitting bids for, or entering into contracts for the performance of, or performing, plastering work in the Chicago area.

7. That the Court enter such orders with respect to the rules, by-laws, and charter of the defendant Association and of defendant Local 5 as is necessary to carry out and enforce the terms of the judgment entered in this cause.

8. That the plaintiff have such other, further and different relief as the nature of the case may require and the Court may deem appropriate in the premises.

15-16 9. That the plaintiff recover the costs of this suit.

JAMES P. MCGRANERY,
Attorney General;
NEWELL A. CLAPP,
Acting Assistant Attorney General;
GEORGE B. HADDOCK,
Special Assistant to the Attorney General;
OTTO KERNER, JR.,
United States Attorney;
WILLIS L. HOTCHKISS,
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HARRY H. FARIS,
CHARLES W. HOUCHINS,
Trial Attorneys,
Suite 820, 208 South LaSalle Street,
Chicago 4, Illinois,
Central 6-6886.

17-18 In United States District Court

[Title omitted]

MOTION TO DISMISS COMPLAINT FOR FAILURE TO STATE A CLAIM—
Filed September 30, 1952

The defendant, EMPLOYING PLASTERERS ASSOCIATION OF CHICAGO, moves the Court to dismiss the action because the Complaint fails to state a claim against this defendant upon which any relief can be rendered.

HOWARD ELLIS,
THOMAS M. THOMAS,
DON H. REUBEN,
Attorneys for Defendant of

KIRKLAND, FLEMING, GREEN, MARTIN & ELLIS,
33 North La Salle Street,
Chicago 2, Illinois,
RAndolph 6-2929.

19-20 In United States District Court

[Title omitted]

MOTION TO DISMISS COMPLAINT FOR FAILURE TO STATE A CLAIM—
Filed October 1, 1952

The defendants, JOURNEYMEN PLASTERERS' PROTECTIVE AND BENEVOLENT SOCIETY, LOCAL No. 5, O. P. & C. F. I. A. and BYRON WILLIAM DALTON, move the Court to dismiss the action because the Complaint fails to state a claim against this defendant upon which any relief can be rendered.

DANIEL D. CARMELL,
Attorney for Journeymen Plasterers, Protective and Benevolent Society, Local No. 5, O. P. & C. F. I. A. and Byron William Dalton.

21 In the United States District Court

JOSEPH HOWARD, ET AL., PLAINTIFFS

vs.

LOCAL 74, WOOD, WIRE AND METAL LATHERS INTERNATIONAL UNION, ET AL., DEFENDANTS

Civil Action
No. 53 C 125

UNITED STATES OF AMERICA, PLAINTIFF

vs.

EMPLOYING LATHERS ASSOCIATION OF CHICAGO AND VICINITY; ET AL., DEFENDANTS

Civil Action
No. 52 C 1639

THE UNITED STATES

vs.

EMPLOYING LATHERS ASSOCIATION OF CHICAGO AND VICINITY; ET AL., DEFENDANTS

No. 52 CR 331

UNITED STATES OF AMERICA, PLAINTIFF

vs.

EMPLOYING PLASTERERS ASSOCIATION OF CHICAGO; ET AL., DEFENDANTS

Civil Action
No. 52 C 1640

THE UNITED STATES

vs.

EMPLOYING PLASTERERS ASSOCIATION OF CHICAGO; ET AL., DEFENDANTS

No. 52 CR 332

22 TRANSCRIPT OF PROCEEDINGS ON RULING ON MOTIONS TO DISMISS

Before HON. J. SAM PERRY, one of the judges of said court, in his courtroom in the United States Court House, Chicago, Illinois, on Monday, July 13, 1953.

BY THE CLERK: 53 C 125, Howard et al. vs. Local 74, etc.;
52 C 1639, United States vs. Employing Lathers Association of Chicago, etc.;

52 CR 331, United States vs. Employing Lathers Association, etc.;
52 C 1640, United States vs. Employing Plasterers Association of Chicago, et al.;
52 CR 332, United States vs. Employing Plasterers Association of Chicago, et al.
Ruling on motions to dismiss.

23 The COURT: Gentlemen, this case has given me a great deal of concern. I have devoted a great deal of time to it.

Of course, for the purposes of this motion only, all of the allegations stand admitted. I say that cautiously, for the purpose of this motion only. When I come to rule I must take it as presumed that every well pleaded fact is true, in order for me to rule upon this motion, and I take it that it is true that there are the racial discriminations, for the purpose of this motion; I take it that it is true that there are the other restrictions, the five-year restriction about journeymen, and the other agreements. On that basis I have arrived at a conclusion. In the beginning I may point out that it is alleged there are 36 lathing contractors in the Chicago area, that about $8,000,000 worth of business was done in the year 1951, and that approximately 16 of said 36 contractors are members of the defendant association, and that they did about $5,000,000 of the
24 $8,000,000 worth of work. In other words, they did 60 per cent, which is a very substantial part of the total amount of the lathing. I am referring now to the lathing situation. From my point of view it would not make any difference if they did 100 per cent of it, as I view the law.

I will review the heart of the indictment very briefly, referring now only to the lathing indictment, for what goes as to the lathing indictment will go for the other also, for the plasterers. The indictment alleges that customarily lathing materials installed by lathing contractors in the Chicago area are purchased from building material dealers in the Chicago area who purchase said material from out-of-state concerns for resale to said plastering contractors who in turn deliver the same to lathing contractors for installation. I am taking the Chicago area to mean the State of Illinois. As far as I can find, there is nothing in the allegations that indicates anything else than that when they speak of the Chicago area the reference is to Chicago, Cook County, DuPage County, Lake
25 County, the whole thing in this particular area here, and not crossing over any state lines. After alleging the aforesaid facts, which I am not repeating but which were in the allegations, the indictment charges that substantial quantities of lathing material are purchased from out-of-state sources by building material dealers in response to and pursuant to prior orders placed with said dealers by plastering contractors, and which building material is subse-

quently delivered to the plastering contractors and redelivered to the lathing contractors for installation.

The indictment then charges that substantial quantities of lathing material are purchased by plastering contractors for building materials, who have in turn secured said building materials from out-of-state sources in order to meet regularly anticipated demands of plastering contractors. In other words, the first allegation there is that the plastering contractors order materials from building materialmen and that the building materialmen themselves buy it out of state and it is shipped apparently to them, and then after it has arrived in the Chicago area it is sold to the plastering
26 contractors who then furnish it to the lathing contractors.

The second one is the same thing, except that when they place the order they get it right quickly because they have already stockpiled.

There is a third phase of the indictment. The indictment further charges that substantial quantities of building material purchased by plastering contractors through building material dealers are obtained from manufacturers and dealers and other sources outside of the State of Illinois, who ship directly to the job site or place of business of said contractors in the Chicago area for delivery to the lathing contractors. The only difference between that and the first one is that in place of the delivery going to the building contractor, the material contractor simply sends it straight to the job as a matter of convenience. There is not anything there I can see, any allegation, that the plastering contractor buys that from out-of-state himself. If he did, if there were such an allegation and if that were the fact, then we would have to go to trial on the issues, because there would then be involved commodities passing in interstate commerce. But that is not the situation as I
27 see it here.

There is no allegation of any effect of that intrastate conspiracy upon the interstate market price of the building material involved. I might add, so far as I can see there is no allegation of any discrimination or anything that would cause a man to buy his building material in Wisconsin or in Chicago or in California, no restraint that I can find in the allegation. There is no allegation of fact of its effect upon the flow of materials into the State of Illinois. We are dealing here with a local restraint and monopoly of local labor, and when I say local I mean Illinois, restraint right here in Illinois, restraint upon local labor service, Illinois service. They do not become associated with the building material until after the building materials have been purchased and have come to a state of rest in the State of Illinois.

To make that perhaps a little clearer, it looks to me, as I view it, that whatever restraint there is takes place after all the buying and selling is done, the water line is complete and the water is being

sprayed out, so to speak, and they are picking it up in buckets
28 and doing what they are doing with it, but they are not cutting the line above. That is the way I look at it, and I cannot see where the Sherman Act was intended by Congress to interfere with local affairs, even though they might be malicious, even though they might be economically unsound, even though they might be unfair and even though they might be illegal. For all I know, some of the actions might violate the Taft-Hartley Act; for all I know some of them might violate the Civil Rights Act. But I am not interpreting the Civil Rights Act. This indictment is brought specifically and is limited to and deals only with the Sherman Act. It is purely conjectural that this practice may remotely and indirectly affect the flow of commerce. It might do it. It might be that it has reduced the number of buildings that are built in this area, it might be it has driven building elsewhere, it might be that it has driven an industry elsewhere, but that is not alleged in the indictment and it would be purely conjectural anyway in my judgment.

There is no allegation showing these defendants intended to burden interstate commerce by this alleged conspiracy. There
29 is no showing that they intended to burden interstate commerce, and there is no allegation of fact that it does, and, to put it frankly, if this were a situation where houses were being built, and there were the one additional allegation that after the houses were built, instead of being attached to the real estate and becoming part and parcel of the local community, that they were put on box cars and sent to Indiana or Wisconsin, if some of the materials had come from there, or to California or any other state in the nation, then you would have interference with interstate commerce that would come under the Sherman Act and you would then have these interferences entering into and affecting the actual price of the commodity as it goes from here elsewhere, and that might very well be a restraint of trade such as would come under the Sherman Act.

In the light of the authorities and the view this Court has taken of the indictments, the complaints do not state a cause of action under the anti-trust laws. I cannot bring myself to extend the law, as a mere District Court. I cannot extend the law by interpretation, because if I did extend it in this case then we
30 would have the law covering every step from the beginning of manufacture to the final consumption, and each and every act of every kind would come under the Sherman Act. In my judgment that would not be within the intention of the Congress. If Congress wishes this Act extended it has the authority under the commerce clause in all likelihood to do so. It may be that the Supreme Court might see this matter otherwise than I do, but it certainly is a matter for the Supreme Court to interpret.

For me to take the time of this Court and to take the time of the Government and the defendants in many weeks of testimony when in my sincere judgment the indictment does not state a cause of action would not be fair to the Government, to the parties, to the Court and to the litigants. It would be a waste of time and effort to so do.

Under the law such an action as this, being dismissed, can go straight to the Supreme Court which can pass directly upon the question of how far this may be extended.

Therefore, counsel will prepare the proper orders for dismissal in accordance with their desires in this case. While I have
31 been discussing primarily the lathing case the same motion will be entered in each of the other cases. That is the order of the court.

Mr. TIERNEY: As to the individual defendants named in the indictments, if they are under bond they will be discharged?

The COURT: Absolutely. Prepare the proper orders.

Mr. MCCLASKEY: My name is William McClaskey, from Moore & Leighton, representing the plaintiff Joseph Howard.

The first motion to be called this morning was for leave to the plaintiff Joseph Howard to file an amended complaint in 30 days from the date hereof.

The COURT: I did not have that called.

The CLERK: I did not call it, Judge.

The COURT: I only ruled on the motion.

Mr. MCCLASKEY: I beg your pardon. I understood——

The COURT: I will take a short recess for a minute, and then you may call that.

Mr. MCCLASKEY: Will that affect the parties here, in regard to this motion?

The COURT: As far as that motion to amend the complaint
32 is concerned, I would think that if you have a complaint on some other statute you should bring it under another statute and not seek to come in under this statute, because these other cases will be dismissed.

Mr. MCCLASKEY: This is a motion to quash and, as I understand the ruling, your Honor's matter was a set matter.

The COURT: That is right.

Mr. MCCLASKEY: I understood the motion of course should be called first.

The COURT: But if your case is dismissed on the set call what purpose would there be in calling a motion of course? Does your amendment purport to amend the complaint still under this particular Act?

Mr. MCCLASKEY: That is my understanding. I came here for the plaintiff, for the attorneys for the plaintiff, Joseph Howard.

The COURT: Well, I don't see any point in granting you leave to file an amended complaint when I have just dismissed the whole suit here on the basis that I have arrived at. We would just be going over the same thing all over. I think the motion will be denied.

33-34 Mr. McCLASKEY: Motion denied?

The COURT: Then if you have other grounds or other statutes under which you wish to proceed I think it would be safer to file a separate, a completely new suit.

Motion denied.

Reporter's Certificate to foregoing transcript omitted in printing.

35 In United States District Court, Northern District of Illinois, Eastern Division

Civil Action No. 53 C 125

JOSEPH HOWARD, BERNARD HOWARD and PAUL HUGH, on their behalf, and on behalf of all those persons similarly situated, PLAINTIFFS

vs.

LOCAL 74 of the WOOD, WIRE AND METAL LATHERS, INTERNATIONAL UNION OF CHICAGO, ILLINOIS AND VICINITY; ELMER LINDSAY, Personally and President of Local 74; WILLIAM EBY, Personally and as Financial Secretary-Treasurer of Local 74; WOOD, WIRE AND METAL LATHERS INTERNATIONAL UNION, A. F. OF L.; WILLIAM McSORELY, Personally and as General President of Wood, Wire and Metal Lathers A. F. of L.; EMPLOYING LATHERS ASSOCIATION OF CHICAGO AND VICINITY, an Illinois corporation; HARVEY D. FOLLETT; EDWARD D. CHOUINARD, DEFENDANTS

Criminal Action No. 52 CR 331

UNITED STATES OF AMERICA, PLAINTIFF

vs.

EMPLOYING LATHERS ASSOCIATION OF CHICAGO AND VICINITY; LOCAL NO. 74 OF WOOD, WIRE AND METAL LATHERS INTERNATIONAL UNION OF CHICAGO, ILLINOIS AND VICINITY; HARRY D. FOLLETT; AND EDWARD D. CHOUINARD, DEFENDANTS

Civil Action 52 C 1639

UNITED STATES OF AMERICA, PLAINTIFF

vs.

EMPLOYING LATHERS ASSOCIATION OF CHICAGO AND VICINITY; ET AL., DEFENDANTS

36 Criminal Action No. 52 CR 332

UNITED STATES OF AMERICA, PLAINTIFF

vs.

EMPLOYING PLASTERERS ASSOCIATION OF CHICAGO; JOURNEYMEN PLASTERERS' PROTECTIVE AND BENEVOLENT SOCIETY, LOCAL NO. 5, O. P. & C. F. I. A.; and BYRON WILLIAM DALTON, DEFENDANTS

Civil Action No. 52 C 1640

UNITED STATES OF AMERICA, PLAINTIFF

vs.

EMPLOYING PLASTERERS ASSOCIATION OF CHICAGO; ET AL., DEFENDANTS

MEMORANDUM—Filed July 20, 1953

All five causes under consideration present similar operations in the building trades of the Chicago area, which operations are alleged to violate the Sherman Act. A summary analysis of the operations and business practice of the lathing industry can serve to present the operations of the plastering industry because they are similar. Since the legal question in both trades is identical, this discussion relative to the lathing industry is equally applicable to the plastering trade and one opinion will serve for all of the cases at bar.

The defendants, the Employing Lathers Association of Chicago and the labor union known as Local No. 74 of the Wood, Wire and Metal Lathers and its officers, Harry D. Follett and Edward D. Chouinard, were indicted in the case at bar for violation of Sections One and Two of the Sherman Act. All of the defendants
37 were residents of the State of Illinois and conducted and carried on their business in the State of Illinois and the acts of conspiracies charged against them were all performed in the State of Illinois.

The indictment charges that there are thirty-six lathing contractors in the Chicago area, an area consisting of the counties of Cook, Du Page and Lake, all three of which are Illinois Counties. All thirty-six of these contractors did about Eight Million Dollars worth of business in 1951. Sixteen of these lathing contractors, who were members of the defendant Employing Lathers Association of Chicago, did about Five Million Dollars worth of work in 1951 in the said three Illinois counties, which amounted to about sixty per cent of all of the lathing business in those counties.

The indictment charged that generally contracts for lathing are executed by building contractors with plastering contractors who

agree, under the terms of such contracts, to deliver lathing material and furnish labor for the lathing work required by the building contractor. The plastering contractor then enters into a sub-contract with the lathing contractor for the installation of lathing material in the building being constructed and said lathing material is furnished to said sub-contractors by the plastering contractor.

A major part of all lathing material used in lathing contracts in the said three Illinois counties is sold by manufacturers and dealers from other states to local material dealers in Illinois for resale in Illinois. They, in turn, sell said lathing materials to plastering contractors in Illinois, who then use such materials, or cause lathing contractors to use them, in constructing the work on build-
38 ings in Illinois, which buildings remain in Illinois and do not again enter into the stream of inter-state commerce.

There are three methods of delivery used by the building material suppliers who live and conduct their business in Illinois. Those methods are as follows:

FIRST: A substantial amount of lathing materials is purchased from out-of-State sources by building material dealers in response and pursuant to prior orders placed with said dealers by plastering contractors, which is subsequently delivered to the plastering contractors and redelivered to the lathing contractors for installation.

SECOND: A substantial amount of lathing materials is purchased by plastering contractors from building material dealers in Illinois, who have, in turn, secured said material from out-of-State sources in order to meet regular, anticipated demands of plastering contractors. In other words, the purchase is made from building material dealers who stockpile plastering material.

THIRD: A substantial amount of lathing material is purchased by plastering contractors from building material dealers who order the same from manufacturers and dealers and other sources outside of the State of Illinois, who, in turn, ship the same directly to the job site or place of business of said contractors in the said three Illinois counties for delivery to the lathing contractors for performance of lathing contracting work in said three Illinois counties, commonly known as the Chicago area. It is charged that said lathing materials, so sold, and installed in Illinois, flow in a continuous and uninterrupted stream from the points of origin in states other than the State of Illinois, to the job site for installation and use
39 in the buildings and other structures in Illinois.

For the purpose of ruling upon this motion before the Court, all of the allegations stand admitted and every well pleaded fact is assumed to be true.

The plastering contractor is not charged with buying from out-of-State dealers but from building material dealers in Illinois, who are not named in the indictments or complaints herein.

The indictment alleges the existence of an agreement between the Association and Local 74, whereby lathing contractors are excluded from engaging in the area trade, unless they are first approved by Local 74. Such approval is dependent upon a five year union membership, which, in turn, is restricted and reduced pursuant to arbitrary racial and family relationship standards. Disapproved contractors cannot employ union lathers; approved lathing contractors are assigned to designated plastering contractors. It is alleged that this practice has suppressed competition among the lathing contractors in the area, and has effected a monopoly among the few approved lathing contractors, and that it is an unreasonable restraint upon trade and commerce.

There is no allegation of any effect of the alleged intrastate conspiracy upon the interstate market price of the building material involved. There is no allegation of any discrimination or anything that would cause a purchaser to buy building material in Wisconsin or in Chicago or in California. There is no allegation of fact of its effect upon the flow of materials into the State of Illinois. This is wholly a charge of local restraint and monopoly by local labor and a local lathers association, all confined to three counties
40 in the State of Illinois. The alleged restraints do not become associated with the building material or ultimate cost of buildings until after the building materials have been purchased and have come to a state of rest in the State of Illinois, so far as the stream of interstate commerce is concerned.

Whatever restraint there is occurs after all the buying and selling is completed. The flow of commerce is not unlike the flow of water and the statute is designed to prevent a break in the pipes through which interstate commerce flows across state lines and to the consumer. The statute is not designed to apply to the use the consumer makes of the articles of commerce after the consumer has completed his purchase, unless the consumer creates a new product and a new stream of commerce that again crosses state boundary lines.

The Sherman Act was not intended by Congress to interfere with local affairs, even though they might be unfair and malicious and economically unsound. This indictment is brought specifically and is limited to and deals only with the Sherman Act. It is purely conjectural whether the practice with which the defendants are charged may remotely and indirectly affect the flow of commerce. It might be that it has reduced the number of buildings that are built in three counties in Illinois; it might be it has driven building and industry elsewhere; but that is not alleged in the indictment.

There is no allegation showing these defendants intended to burden interstate commerce by this alleged conspiracy. There is no allegation of fact that it does so burden interstate commerce.
41-42 If this were a situation where portable houses were being built, and there was an additional allegation that after the

houses were built, instead of being attached to the real estate and becoming part and parcel of the local Illinois community, where all the acts are alleged to have been committed; and instead of being affixed to real estate remaining in Illinois they were loaded on box cars and sent to other states then there would be such interference with interstate commerce as would support these indictments and complaints herein.

In the light of the authorities, it is the view of this Court indictments and complaints herein do not state an offense or cause of action under the anti-trust laws.

This Court cannot extend the law by interpretation, because, if this Court did extend it in this case, then every step in commerce from the beginning of manufacture to and including the final consumption, and each and every act of every kind thereafter that might affect the quantity or price of articles of commerce would come under the Sherman Act. This Court is bound by the language of the Sherman Act and its subsequent judicial interpretations. It would be presumptuous of a District Court to extend the statute in question to cover the facts alleged in the instant indictment by breaking a new path into the wilderness of commerce law, when the higher Courts have already circumscribed pathways that clearly indicate that the jurisdiction of this Court over interstate commerce ends at the same time and place where interstate commerce itself ends.

Appropriate orders in accord with this opinion will be entered in each case forthwith.

J. S. PERRY,
Judge.

43-44 In United States District Court, Northern District of Illinois, Eastern Division

UNITED STATES OF AMERICA, PLAINTIFF,

vs.

EMPLOYING PLASTERERS ASSOCIATION OF CHICAGO; JOURNEYMEN PLASTERERS' PROTECTIVE AND BENEVOLENT SOCIETY, LOCAL NO. 5, O. P. & C. F. I. A.; and BYRON WILLIAM DALTON, DEFENDANTS

Civil Action No. 52 C 1640

Equitable Relief Sought

ORDER DISMISSING COMPLAINT—July 20, 1953

This cause came on to be heard upon the motions of all defendants herein, through their respective attorneys, to dismiss the complaint herein for failure to state a claim upon which relief can be granted under the Sherman Anti-Trust Laws. The Court has ex-

amined and considered the pleadings and briefs of counsel, filed in this cause. The contention of all defendants that the complaint fails to state a claim upon which relief can be granted under the Sherman Anti-Trust Laws has been considered and sustained.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the complaint herein be dismissed as to all defendants.

ENTER:

J. S. PERRY,
Judge.

Jul 20, 1953.

45-46 In United States District Court

[Title omitted]

PETITION FOR APPEAL—Filed September 18, 1953

The United States of America, plaintiff in the above-entitled cause, considering itself aggrieved by the final decree of this Court entered on the twentieth day of July, 1953, does hereby pray an appeal from said final decree to the Supreme Court of the United States. Pursuant to Rule 12 of the Rules of the Supreme Court, the plaintiff presents to this Court herewith a statement showing the basis of jurisdiction of the Supreme Court to entertain an appeal in this cause.

The particulars wherein the plaintiff considers the order erroneous are set forth in the assignment of errors and prayer for reversal accompanying this petition and to which reference is hereby made.

The plaintiff prays that its appeal may be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings, and documents upon which said final decree was based, duly authenticated, be sent to the Supreme Court of the United States under the rules of said Court in such cases made and provided.

STANLEY N. BARNES,
Assistant Attorney General.

EARL A. JINKINSON,
Special Assistant to the Attorney General.

Dated this 18th day of September, 1953.

47-50 In United States District Court

[Title omitted]

ORDER ALLOWING APPEAL—September 18, 1953

In the above-entitled cause, the United States of America, plaintiff, having made and filed its petition praying an appeal to the Supreme Court of the United States from the final decree of

this Court in this cause entered on the twentieth day of July, 1953, and having also made and filed its petition for appeal, assignment of errors and prayed for reversal, and statement of jurisdiction, and having in all respects conformed to the statutes and rules in such cases made and provided,

IT IS THEREFORE ORDERED AND ADJUDGED

That the appeal be and the same is hereby allowed as prayed for.

J. S. PERRY,
United States District Judge.

Dated this 18th day of September, 1953.

51 In United States District Court

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed September 18, 1953

The United States of America, plaintiff in the above-entitled cause, in connection with its petition for appeal to the Supreme Court of the United States, hereby assigns error to the record and proceedings and the entry of the final judgment of the district court on July 20, 1953, in the above-entitled cause, and says that in the entry of the final judgment the district court committed error to the prejudice of the plaintiff in the following particulars:

1. The court erred in holding that the allegations of the complaint do not show a restraint or monopolization of interstate commerce.

2. The court erred in holding that, under the allegations of the complaint, the conspiracy to restrain and monopolize which is set forth operated only upon commerce which is intrastate.

3. The court erred in adjudging that the complaint fails to state a claim upon which relief can be granted.

4. The court erred in entering judgment dismissing the complaint.

WHEREFORE, plaintiff prays that the final judgment of the district court may be reversed to the extent that it is inconsistent
52-81 with the errors herein assigned by the plaintiff, and for such other and fit relief as to the court may seem just and proper.

STANLEY N. BARNES,
Assistant Attorney General.

EARL A. JINKINSON,
Special Assistant to the Attorney General.

Dated this 18th day of September, 1953.

82-86 STATEMENT CALLING ATTENTION TO THE PROVISIONS OF SUPREME COURT RULE 12(3) (omitted in printing)

87-96 PRAECIPE (omitted in printing)

97 Clerk's Certificate to foregoing transcript omitted in printing.

98-99 In the Supreme Court of the United States

October Term, 1953

No. 440

UNITED STATES OF AMERICA, APPELLANT

v.

EMPLOYING PLASTERERS ASSOCAITION OF CHICAGO, ET AL.

On Appeal from the United States District Court for the Northern District of Illinois

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STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed November 4, 1953

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a. Appellant adopts for its statement of points upon which it intends to rely in its appeal to this Court the points contained in its Assignment of Errors heretofore filed.

b. Appellant designates for printing by the Clerk of this Court the entire record in this cause as filed in this Court pursuant to appellant's praecipe to the clerk of the United States District Court for the Northern District of Illinois, except that Items 8, 10, 11 and 12 of said praecipe may be omitted from printing.

November 4, 1953.

ROBERT L. STERN,
Acting Solicitor General.

[fol. 100] (File endorsement omitted.)

[fol. 101] SUPREME COURT OF THE UNITED STATES

No. 440 ——, October Term, 1953

UNITED STATES OF AMERICA, APPELLANT

vs.

EMPLOYING PLASTERERS ASSOCIATION OF CHICAGO, ET AL.

ORDER NOTING PROBABLE JURISDICTION—November 30, 1953

APPEAL from the United States District Court for the Northern District of Illinois.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.

☆ U. S. GOVERNMENT PRINTING OFFICE 1953 282309 670

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. 52 C 1640

UNITED STATES OF AMERICA, PLAINTIFF,

vs.

EMPLOYING PLASTERERS ASSOCIATION OF CHICAGO, JOURNEYMEN PLASTERERS' PROTECTIVE AND BENEVOLENT SOCIETY, LOCAL NO. 5, O.P. & C.F.I.A., AND BYRON WILLIAM DALTON, DEFENDANTS.

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the district court entered in this cause on July 20, 1953. A petition for appeal is presented to the district court herewith, to wit, on September 18, 1953.

OPINION BELOW

The opinion of the district court for the Northern District of Illinois is not yet reported. A copy of the opinion is attached hereto as Appendix A.[1] *

[1] The court's opinion also covers a related civil case (*United States* v. *Employing Lathers Association of Chicago and*

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this cause is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U.S.C. 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869.

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

United States v. *Women's Sportswear Mfg. Assn.*, 336 U. S. 460.

United States v. *New Wrinkle, Inc.*, 342 U.S. 371.

QUESTION PRESENTED

The complaint charges the defendants with conspiring to limit those who may engage in the business of plastering contracting in the Chicago area, which business consists of furnishing and installing, pursuant to contracts with general contractors or builders, plastering materials in buildings. Boycotts and work slowdowns were among the means alleged to have been employed to effect this conspiracy. The complaint alleges that the major part of the materials purchased and installed by the plas-

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Vicinity, et al., Civ. No. 52 C 1639) in which the United States is concurrently petitioning for appeal, and two criminal proceedings, which respectively parallel the two civil cases. The judgments of dismissal in the criminal cases have been appealed to the Court of Appeals for the Seventh Circuit, but these appeals will be held in abeyance pending determination of the civil appeals.

* (Clerk's note. This opinion is identical with that printed as Appendix "A" to the Statement as to Jurisdiction in No. 439 and is not reprinted here).

tering contractors in the Chicago area are shipped from outside the state for use in such installation; that substantial quantities of the materials so shipped and installed are purchased by building material dealers in response to prior orders from plastering contractors; that substantial quantities of the materials purchased by plastering contractors through building material dealers are shipped from out-of-state sources directly to the job site; that the foregoing plastering materials flow in a continuous, uninterrupted stream from outside the state to the places of installation in the Chicago area; that the services performed by plastering contractors are an integral part of, and necessary to, this continuous interstate movement; and that restraint upon and interference with the business of plastering contracting in the Chicago area affects, burdens and restrains this interstate movement.

The question presented is whether such allegations show that the conspiracy charged against the defendants restrained or monopolized commerce which is interstate, so as to bring defendants' conduct within the prohibitions of the Sherman Act.

STATUTE INVOLVED

The pertinent provisions of Sections 1, 2, and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended (15 U.S.C. 1, 2, 4) commonly known as the Sherman Act, are as follows:

> Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the sev-

eral States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.

Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine, or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *.

* * * * *

Sec. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * *

STATEMENT

This is a civil action brought by the United States under Section 4 of the Sherman Act against Employing Plasterers Association of Chicago (the "Association"), Journeymen Plasterers' Protective and Benevolent Society, Local No. 5, O.P. & C.F.I.A. ("Local No. 5"), and Byron William Dalton. The Association is an incorporated trade association, organized in Illinois, whose membership consists of 39 plastering contractors doing bus-

iness in the Chicago area. Local No. 5 is a trade union whose members (approximately 1,200 journeymen plasterers and plasterers' apprentices) perform substantially all of the plastering work in the Chicago area. Defendant Dalton is the president of Local No. 5.

The complaint charged the defendants with conspiring to restrain interstate commerce in plastering materials shipped from outside the State of Illinois for installation in buildings in the Chicago area, and with conspiring to monopolize such commerce, in violation of Sections 1 and 2 of the Sherman Act. On defendants' motions to dismiss the complaint for failure to state a cause of action, the district court held that the allegations did not show that defendants' conduct had an effect on interstate commerce sufficient to bring their conduct within the reach of the Sherman Act. The court accordingly entered a judgment dismissing the complaint as to all defendants.

The principal allegations of the complaint (admitted by the motion to dismiss) are as follows:[2]

Plastering contractors are independent entrepreneurs who undertake, pursuant to contractural arrangements with general contractors or builders, to do the plastering work in a building (par. 6). They furnish both the necessary materials and the labor, employing plasterers and their apprentices to perform the actual task of plastering (*ibid.*), In

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[2] A copy of the complaint is attached hereto as Appendix B.

1951, the 39 members of the Association [3] did over 60% of the plastering contracting business in the Chicago area, and the dollar volume of their business exceeded $15,000,000 (pars. 8, 9).

Plastering contractors customarily purchase their materials from building material dealers, who obtain a major part of these materials from out-of-state sources (par. 10). Substantial quantities of these purchases are made "in response and pursuant to prior orders" placed by plastering contractors, and these materials, upon receipt, are "then delivered" to the contractors who ordered them. (Par. 11). The dealers also purchase substantial quantities of materials "in order to meet regular anticipated demand" of plastering contractors, and materials so purchased "move in a continuous flow in interstate commerce" to the plastering contractors (par. 12). Substantial quantities of materials purchased through dealers and obtained from sources outside the state are shipped directly to the "job site" or to the contractor's place of business, and these materials also "flow in a continuous, uninterrupted stream from their origin * * * to the site of their installation" (par. 13).

The plastering operation is an integral part of the building construction industry and its performance is necessary to the completion of numerous other essential building operations. A substantial part of the building materials used in such related operations are manufactured outside of Illinois and

[3] There are approximately 140 plastering contractors in the Chicago area (par. 8).

shipped into the Chicago area for use or installation. Hence, any restraint upon or interference with the performance of plastering work constitutes a burden and restraint upon the interstate flow of plastering materials and other building materials (Pars. 15-17.)

A number of plastering contractors domiciled outside the State of Illinois specialize in performing large construction jobs in various states. In carrying out their plastering contracts, these firms place orders for shipment of materials to job sites in different states, transport supervisory employees to such sites, and exercise control and supervision from their home offices over performance of contracts in other states. Interference with their ability to enter into or perform plastering contracts in the Chicago area restrains interstate trade and commerce. (Par. 18.)

The defendants are parties to a conspiracy, beginning about 1938, to suppress competition among plastering contractors in the Chicago area and to restrict and exclude persons from engaging in this business, in restraint of interstate commerce in plastering materials, and to monopolize interstate commerce in the sale and distribution of plastering materials utilized in performing plastering contracting work in the Chicago area (par. 19). As a part of this conspiracy the defendants have agreed (a) that no person be permitted to engage in the plastering contracting business in the Chicago area without securing the approval of Local No. 5 and its president; (b) that Local No. 5 refuse to allow

its members to work for any plastering contractor who has not received such approval; (c) that a plastering contractor may not change its "form of business organization" without securing the approval of Local No. 5 and its president; (d) that no Association member work on a job with respect to which the general contractor has an unresolved dispute with another plastering contractor; (e) that Local No. 5 and its president aid in enforcing the foregoing agreement by instituting work slowdowns and other harassing tactics; (f) that out-of-state plastering contractors be excluded from the Chicago area; and (g) that Local No. 5 institute work slowdowns and employ other harassing tactics to keep out-of-state plastering contractors from operating in the Chicago area (par. 20).

To implement their conspiracy, the defendants have adopted and enforced numerous specific rules, regulations and procedures, which they have enforced by means of boycotts, fines, work slowdowns, harassment and intimidation. They have employed such means to compel Association members, general contractors, and out-of-state plastering contractors to adhere to the terms of defendants' conspiracy, and to control and limit the business of plastering contracting in the Chicago area. (Pars. 21-28).

The conspiracy has had the following effects, among others: entry into the plastering business in the Chicago area has been impaired, thwarted, and competition in the business restrained; the right of

out-of-state plastering contractors to perform work in the Chicago area has been impeded; the cost of building construction in that area has been artificially enhanced; and the interstate flow of building materials, including plastering materials, has been unlawfully restrained (par. 29).

THE QUESTION IS SUBSTANTIAL

On the substantiality of the issue presented by this appeal, the Government relies upon and adopts the views set forth in the jurisdictional statement filed in the appeal which it is taking in the related case of *United States* v. *Employing Lathers Association, et al.* Insofar as the allegations of the complaint in that case pertinent to the interstate commerce question differ from the corresponding allegations of the complaint in the instant case, the latter even more clearly set forth a restraint and monopolization of commerce which is interstate. In the *Lathers Association* case, unlike the instant case, goods coming from other states pass from the purchasing plastering contractors to those to whom they subcontract the lathing work. In addition, the conspiracy charged in the instant case, unlike the *Lathers Association* case, involves excluding from business in the Chicago area contractors located outside the State of Illinois who, in performing contracts in states other than the state of location, ship materials and transport mechanics and supervisory employees in interstate commerce and otherwise engage in interstate transactions (compl., par. 18).

We submit that the question presented by this appeal is substantial and of public importance.

Respectfully submitted,

ROBERT L. STERN,
Acting Solicitor General.

APPENDIX "B"

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, PLAINTIFF,

v.

EMPLOYING PLASTERERS ASSOCIATION OF CHICAGO; JOURNEYMEN PLASTERERS' PROTECTIVE AND BENEVOLENT SOCIETY, LOCAL NO. 5, O.P. & C.F.I.A.; AND BYRON WILLIAM DALTON, DEFENDANTS.

Civil Action No. 52 C 1640

Equitable Relief Sought

Filed: July 31, 1952

COMPLAINT

The United States of America, by its attorneys, acting under the direction of the Attorney General, brings this complaint against the defendants named herein, and alleges as follows:

I

JURISDICTION AND VENUE

1. This complaint is filed and these proceedings are instituted against the defendants named herein under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended (15 U.S.C. Sec. 4), entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, in order to prevent and restrain continuing violations by the

defendants, as hereinafter alleged, of Sections 1 and 2 of that Act (15 U.S.C. Secs. 1, 2).

2. The defendants Employing Plasterers Association of Chicago, Journeymen Plasterers' Protective and Benevolent Society, Local No. 5, O.P. & C.F.I.A., and Byron William Dalton, as hereinafter alleged, maintains offices and transact business within the Eastern Division of the Northern District of Illinois and are found therein.

II

Defendants

3. The following are named as defendants herein:

(a) Employing Plasterers Association of Chicago, a corporation organized and existing under the General Not-for-Profit Corporation laws of the State of Illinois, with its place of business and offices in Chicago, Illinois. Said corporation, sometimes hereinafter referred to as the "Association," is a trade association whose membership consists of 39 plastering contractors doing business in the Chicago area;

(b) Journeymen Plasterers' Protective and Benevolent Society, Local No. 5, O.P. & C.F.I.A., sometimes hereinafter referred to as "Local 5", an unincorporated trade union or association of individuals chartered by and operating under the authority of the Operative Plasterers and Cement Finishers International Association of the United States and Canada. Local 5 has its place of business and

offices in Chicago, Illinois. The membership of Local 5 consists of approximately 1200 journeymen plasterers and plasterers' apprentices who perform substantially all of the plastering work in the Chicago area;

(c) Byron William Dalton, who resides at 1245 North Shore Avenue, Chicago, Illinois. Byron William Dalton is president of Local 5 and was business agent of such local for many years prior to becoming president.

4. Whenever in this complaint it is alleged that the Association or Local 5 did any act or thing, such allegation shall be deemed to mean that such act was done by the respective officers, employees, agents, or representatives of the Association or Local 5.

III

Co-Conspirators

5. Numerous plastering contractors in the Chicago area, including those plastering contractors who are members of the Association, were co-conspirators in the combination and conspiracy hereinafter alleged.

IV

Definitions

6. As used herein, the term "plastering contractor" means an independent entrepreneur who is engaged in the business of entering into and performing contracts for the furnishing of plastering materials and the installation thereof in buildings. Such contracts are normally made with general contractors or builders. Plastering contractors func-

tion as managers and owners of businesses and employ journeymen and apprentice plasterers to perform plastering work.

7. As used herein, the term "Chicago area" means that area within the recognized jurisdiction of Local 5. It includes Chicago, Illinois and most of the remaining area of Cook County, Illinois.

V

Nature of Trade and Commerce

8. There are approximately 140 plastering contractors in the Chicago area who are engaged in the business of performing plastering contracts, which involve the furnishing of plastering materials and the installation thereof in buildings. In performing said contracts, said contractors sell and distribute plastering materials, as well as performing the services of installing the same, and said contracts include a charge for the plastering materials as well as the services in the installation thereof. The dollar volume of the plastering contracts entered into by the plastering contractors in the Chicago area in 1951 amounted to more than $25,000,000.

9. Approximately 39 of the above referred to plastering contractors in the Chicago area are members of the defendant Association. The dollar volume of plastering contracts entered into by plastering contractors who are members of the defendant Association totalled in excess of $15,000,000 in 1951, or 60% of the total amount of plastering contracting business in the Chicago area in that year.

10. The materials, herein referred to as plastering materials, supplied by plastering contractors in

the performance of plastering contracts, include gypsum, vermiculite, perlite, gypsum lath, metal lath, lime, cement, cornerites, corner beads, channel irons, and tie-wire. A major part of all of said plastering materials used in the performance of plastering contracts in the Chicago area is produced in States other than the State of Illinois, and is shipped in interstate commerce from said States into the Chicago area for sale and installation therein.

11. Customarily, the plastering materials sold and installed by plastering contractors in the Chicago area are purchased from building material dealers in the area who purchase said materials from out-of-State sources for resale to said plastering contractors and other customers. Substantial quantities of said plastering materials are purchased from out-of-State sources by said building material dealers in response and pursuant to prior orders placed with said dealers by plastering contractors, and, upon receipt of said materials from said out-of-State sources, said materials are then delivered to the plastering contractors who ordered the same.

12. Substantial quantities of plastering materials purchased by plastering contractors in the Chicago area are obtained from building material dealers who have in turn secured said materials from out-of-State sources in order to meet the regular anticipated demand of said plastering contractors. Said plastering materials purchased by such dealers from out-of-State sources to meet the regular anticipated demands of said plastering contractors move in a continuous flow in interstate commerce from

said out-of-State sources to the plastering contractors.

13. Substantial quantities of plastering materials purchased by plastering contractors through building material dealers are obtained from manufacturers, dealers, or other sources outside the State of Illinois who ship directly to the job site or place of business of said contractors in the Chicago area where they are utilized by the plastering contractor in performing plastering contracting work. Said plastering materials sold and installed in the Chicago area flow in a continuous, uninterrupted stream from their origin in States other than the State of Illinois to the site of their installation and use in buildings and other structures in the Chicago area.

14. Consumers of plastering materials ordinarily do not install said materials, and this service is customarily performed by plastering contractors, who employ and supervise skilled labor for this purpose. The service performed by plastering contractors in the Chicago area in distributing, selling, and installing plastering materials, is an integral part of, and necessary to, the movement in interstate commerce of plastering materials which are manufactured in States other than the State of Illinois and which are distributed, sold, and installed in the Chicago area. Thus, plastering contractors are conduits through which plastering materials manufactured and shipped from States other than the State of Illinois are sold and distributed to the consuming public in the Chicago area. Said plastering materials flow in a continuous, uninterrupted stream from their points of origin in States other

than Illinois to their places of installation and use in buildings in the Chicago area.

15. The plastering operation is an integral part of the building construction industry, which, in the Chicago area in 1951, engaged in new building construction and remodeling to the value of approximately a half billion dollars, and the performance of said plastering operation is necessary to the completion of other building operations, including interior painting and decoration and the installation of plumbing fixtures, heating and air conditioning outlets and vents, electrical outlets and fixtures, flooring and interior wood trim, and window and door sashes. A substantial part of all of said building materials and appurtenances is produced in States other than Illinois and is sold and shipped in interstate commerce from said States to the Chicago area for distribution and use in buildings in said area.

16. The installation or use in buildings of said building materials and appurtenances is an integral part of, and necessary to, the movement in interstate commerce of said materials manufactured in States other than the State of Illinois and which are distributed, sold and installed in the Chicago area. Substantial quantities of said building materials and appurtenances flow in a continuous uninterrupted stream from their points of origin in States other than Illinois to the places of installation and use in buildings in the Chicago area.

17. Any restraint upon or disruption in or interference with the performance of plastering work in the Chicago area necessarily and directly restrains and affects the interstate flow of plastering ma-

terials, and also constitutes a direct and substantial burden and restraint upon the interstate flow of all said other building materials and appurtenances entering into the construction of buildings in the Chicago area.

18. There are a number of large plastering contractors located outside of the State of Illinois who engage in performing plastering contracts in many states and who specialize in large construction jobs such as housing projects, office buildings, hospitals, and government buildings. In the performance of such contracts, said contractors from their respective home offices located in States other than Illinois place orders for the shipment of building materials to job sites in different states, transport plastering mechanics and supervisory employees to said job sites, enter into arrangements for financing of their operations, and exercise control and supervision over the performance of said contracts in other states. Said companies are engaged in interstate trade and commerce, and any restraint upon or interference with their ability to enter into or to perform plastering contracts in the Chicago area constitutes a restraint upon interstate trade and commerce.

VI

Combination and Conspiracy

19. Beginning in or about 1938, and continuing to the date of the filing of this complaint, the defendants and their co-conspirators, and others to the plaintiff unknown, have engaged in an unlawful combination and conspiracy to suppress competition among the plastering contractors in the Chi-

cago area, and to restrict and exclude persons from engaging in the plastering contracting business in said area, in unreasonable restraint of the hereinbefore described trade and commerce among the several States, and to monopolize the interstate commerce as hereinbefore described in the sale, distribution and installation of plastering materials utilized in the Chicago area in the performance of plastering contracting work, in violation of Sections 1 and 2 of the Act of Congress of July 2, 1890, as amended (15 U.S.C. Sec. 1 and 2), commonly known as the Sherman Act. Said offenses are continuing and will continue unless the relief hereinafter prayer for in this complaint is granted.

20. The aforesaid combination and conspiracy has consisted of a continuing agreement and concert of action among the defendants and their co-conspirators, the substantial terms of which have been that they agree:

(a) That no person or firm be permitted to engage in business as a plastering contractor in the Chicago area without first securing the approval of Local 5 and the defendant Byron Dalton;

(b) That the defendant Local 5 refuse to allow its members to work for any plastering contractor who has not received the approval of Local 5 to enter into or to engage in the plastering contracting business;

(c) That no person or firm approved by Local 5 and the defendant Byron Dalton as a plastering contractor shall thereafter change its form of business organization without first securing the approval of the said defendants;

(d) That none of the members of the defendant Association perform plastering contracting work on any job with respect to which the general contractor has an unresolved dispute with another plastering contractor;

(e) That defendants Local 5 and Byron Dalton aid in the enforcement of the agreement referred to in (d) above, by instituting work slowdowns and other harassing tactics;

(f) That out-of-State plastering contractors be excluded from engaging in the plastering contracting business in the Chicago area;

(g) That Local 5 institute work slowdowns and otherwise harass and intimidate any out-of-State plastering contractor who engages in the plastering business in the Chicago area.

21. During the period of time covered by this complaint and for the purpose of effecting the aforesaid combination and conspiracy, the defendants and their co-conspirators, by agreement and concert of action, have done the things which, as hereinbefore alleged, they conspired to do, and more particularly have done, among others, the acts and things hereinafter described.

22. For many years past, the defendant Local 5 has maintained and enforced rules and regulations which require that any person who wishes to become a plastering contractor in the Chicago area must first appear before a special Contractors Examining Board established by Local 5 and composed exclusively of officers and members of that Local. The approval of that Board is a prerequisite to the ability of any plastering contractor to secure union labor in the Chicago area, or to perform plastering

contracts on union jobs. Local 5 requires that a prospective plastering contractor must have been a member of Local 5 for at least five years before his application to engage in the plastering contracting business will be considered. The defendant Local 5 has denied to numerous persons the right to enter the plastering contracting business in the Chicago area and has denied that right particularly to persons who have not been members of Local 5 for five years.

23. No plastering contractor in the Chicago area who has not first received the approval of the special Contractors Examining Board established by Local 5 can employ journeymen plasterers and apprentices who are members of Local 5, with the exception that plastering contractors who were in the business prior to the inception of this conspiracy have been permitted to employ members of Local 5 and to remain in business.

24. No plastering contractor in the Chicago area is permitted to alter the membership or management of his firm or organize as a corporation without first applying for and securing the approval of Local 5. Plastering contractors who have made such management changes without the prior approval of Local 5 have been subjected to penalties and fines imposed by Local 5.

25. For many years past, the defendant Association and Local 5 have had incorporated into a joint agreement a so-called "original contractor" rule. Under such rule, plastering contractors in the Chicago area, including the members of defendant Association, agree to and are required to boycott and refuse to enter into plastering contracts with any

general contractor on any job on which another plastering contractor has started work or has received a contract unless the original plastering contractor gives his approval to the substitution of the contractor. The rule forces general contractors who may have a dispute with their plastering contractor to accede to the demands of the original plastering contractor by preventing the general contractor from securing the services of a different plastering contractor.

26. This "original contractor" rule is enforced by work slowdowns against any plastering contractor violating the rule, and finding and intimidating union members who work for plastering contractors who are violating the "original contractor" rule.

27. When a general contractor has attempted to escape the effect of the "original contractor" rule by contracting with out-of-State union plastering contractors to do plastering work in the Chicago area, the defendants have harassed and intimidated such out-of-State plastering contractors in order to insure adherence to the "original contractor" rule.

28. Defendants have systematically followed the policy of preventing and discouraging all out-of-State union contractors from seeking or performing plastering contracts in the Chicago area by work slowdowns, fines on union labor, intimidation, and by other means. Defendants have been so successful in excluding out-of-State plastering contractors from the Chicago area by use of tactics such as those described above that no out-of-State plastering contractors have undertaken to perform plastering contracts in the Chicago area for nearly

twenty years except for one veterans hospital, one federal housing project, and one State hospital.

VII

Effects

29. The effects of the aforesaid combination and conspiracy, among others, have been as follows:

(a) The right of out-of-State plastering contractors to come into the Chicago area and perform plastering work has been unlawfully restrained and impeded.

(b) Competition among plastering contractors in the Chicago area has been unlawfully restrained, and the traditional American right of a person to enter into a business of his own choice without hindrance by illegal restraints of trade has been impaired and thwarted.

(c) The flow in interstate trade and commerce of building materials used in the building industry, including materials used by the plastering industry, has been unlawfully restrained.

(d) The cost of building construction in the Chicago area has been artificially and illegally increased.

(e) The public has been denied the benefits in the construction industry in the Chicago area which would result from competition free from illegal restraints in the plastering phases of the building construction industry.

Prayer

Wherefore, plaintiff prays:

1. That the Court adjudge and decree that the aforesaid combination and conspiracy entered into by the defendants and all the acts done pursuant thereto constitute an unlawful restraint of interstate trade and commerce in violation of Sections 1 and 2 of the Sherman Act.

2. That the defendants and each of them, and their directors, officers, and agents, and employees, be enjoined from continuing, renewing or reviving the unlawful combination and conspiracy hereinbefore alleged, or any combination or conspiracy having a similar purpose or effect.

3. That the defendants and each of them be enjoined from continuing in effect, or maintaining or enforcing the so-called "original contractor rule" or restriction or any other rule or restriction having a similar purpose or effect.

4. That the defendants Byron Dalton and Local 5 be ordered to dissolve the so-called special Contractors Examining Board, and that the defendants and each of them be hereafter enjoined from creating or maintaining or taking part in the creation or maintenance of any other board or group which takes action or makes recommendation for the purpose or with the effect of excluding persons or firms from engaging in the plastering contractors business, or which takes action or makes recommendation for

the purpose or with the effect of determining or passing upon the qualifications of any person or company to engage in the plastering contracting business; provided, however, that the judgment entered in this cause shall not prohibit Local 5 from entering into agreements with existing or prospective plastering contractors relating to wages, hours, and other legitimate terms of working conditions.

5. That the defendants be enjoined from adopting, maintaining, or enforcing any rule or restriction, or taking any action, having the purpose or effect of preventing or restricting members of Local 5 or any other persons from engaging in the plastering contracting business.

6. That the defendants and each of them be enjoined from harassing, intimidating, hindering, or preventing any out-of-State plastering contractor from submitting bids for, or entering into contracts for the performance of, or performing, plastering work in the Chicago area.

7. That the Court enter such orders with respect to the rules, by-laws, and charter of the defendant Association and of defendant Local 5 as is necessary to carry out and enforce the terms of the judgment entered in this cause.

8. That the plaintiff have such other, further and different relief as the nature of the case may require and the Court may deem appropriate in the premises.

9. That the plaintiff recover the costs of this suit.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 440

UNITED STATES OF AMERICA, APPELLANT

v.

EMPLOYING PLASTERERS ASSOCIATION OF CHICAGO, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court (R. 17) is not yet reported.

JURISDICTION

The final judgment of the district court was entered on July 20, 1953 (R. 20–21). The petition for appeal was filed and allowed on September 18, 1953 (R. 21). The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869. This Court noted probable

jurisdiction of the appeal on November 30, 1953 (R. 24).

QUESTION PRESENTED

The complaint charges the defendants with conspiring to restrict and exclude persons from engaging in the business of contracting to furnish and install plastering materials in buildings constructed in the Chicago area, and to suppress competition among those engaged in this business. The complaint alleges that a major part of the materials which the plastering contractors supply and install are shipped into the Chicago area from outside the state for use and installation in buildings in that area. The complaint further alleges that substantial quantities of these materials, which plastering contractors customarily purchase from local building material dealers, are shipped directly to the job site or to the purchasing contractor's place of business in the Chicago area, and that the dealers purchase substantial quantities from outside of Illinois pursuant to prior orders placed with them by plastering contractors. It is also alleged that all materials so shipped from other states flow in a continuous, uninterrupted stream from their out-of-state origins to their places of installation and use in Chicago-area buildings, and that the services performed by the plastering contractors are essential to this interstate flow.

The question presented is whether, upon such allegations, the conspiracy charged against the

defendants restrained commerce which is interstate, in violation of Section 1 of the Sherman Act.

STATUTE INVOLVED

The Act of July 2, 1890, 26 Stat. 209, known as the Sherman Act, as amended, provides in part as follows:

> SECTION 1 [as amended by the Act of August 17, 1937, 50 Stat. 693]. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *. [15 U. S. C. 1.]
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> * * * * *
>
> SEC. 4 [as amended by the Act of March 3, 1911, 36 Stat. 1167]. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. * * * [15 U. S. C. 4.]

STATEMENT

This is a civil action brought by the United States under Section 4 of the Sherman Act against

a trade association whose membership consists of 39 plastering contractors doing business in the Chicago area,[1] a local trade union whose members (approximately 1,200 journeymen and apprentice plasterers) perform substantially all the plastering work in the Chicago area, and the president of the defendant trade union. We will refer to the defendant union as Local 5 and to the defendant trade association as the Association.[2]

The complaint charged the defendants with conspiring to restrain interstate commerce in plastering materials shipped from outside the State of Illinois for installation in buildings in the Chicago area.[3] On defendants' motion to dismiss the complaint for failure to state a cause of action, the district court held that the allegations did not show that defendants' conduct had an effect on interstate commerce sufficient to

[1] The "Chicago area," as defined in the complaint (par. 7, R. 2–3), includes Chicago and most of the remaining area of Cook County, Illinois.

[2] The Association's name is Employing Plasterers Association of Chicago and the name of Local 5 is Journeymen Plasterers' Protective and Benevolent Society, Local No. 5, O. P. & C. F. I. A. Local 5 is chartered by the Operative Plasterers and Cement Finishers International Association of the United States and Canada (R. 2).

[3] For reasons stated in our brief (note 2, p. 4) in the *Lathers Association* case, No. 439, we are not pressing on this appeal a further charge that the defendants conspired to monopolize interstate commerce in plastering materials. If this Court reverses the judgment below, the Government, on return of the case to the district court, will eliminate the charge of violation of Section 2 of the Act.

bring their conduct within the reach of the Sherman Act.[4]

The principal allegations of the complaint (admitted by the motions to dismiss) are as follows:

Plastering contractors are engaged in the business of making and carrying out contracts to furnish and install plastering materials in buildings.[5] They function as managers of a business and employ journeymen and apprentice plasterers to do the actual plastering work. Their contracts, which normally are made with general contractors or builders, include a charge for the plastering materials and for the service of installation. In 1951 the 39 members of the Association[6] did over 60% of the plastering contracting business in the Chicago area, and the dollar volume of their business exceeded $15,000,000. (Pars. 6, 8–9, R. 2–3.)

The plastering materials sold and installed by plastering contractors in the Chicago area are

[4] As stated in the Government's brief in the *Employing Lathers Association* case (No. 439), the district court's opinion applied to the complaints in both that case and the instant case, as well as to the two indictments which respectively parallel the complaints in the civil cases.

[5] The plastering materials supplied in these contracts include gypsum, vermiculite, perlite, lime, cement, gypsum lath, metal lath, cornerites, corner beads, channel irons and tie-wire (par. 10, R. 3).

[6] There are approximately 140 plastering contractors in the Chicago area (par. 8, R. 3).

customarily purchased from building material dealers in the area (par. 11, R. 3). A major part of these materials is produced in states other than Illinois and is "shipped in interstate commerce" for sale and installation in the Chicago area (par. 10, R. 3). Substantial quantities of these purchases are "in response and pursuant to prior orders" placed by plastering contractors (par. 11, R. 3). Dealers also purchase substantial quantities from out-of-state sources in order to meet the "regular anticipated demand" of plastering contractors, and such materials "move in a continuous flow in interstate commerce from said out-of-State sources to the plastering contractors" (par. 12, R. 3–4). In addition, plastering contractors purchase "through" local dealers substantial quantities of plastering materials which are shipped from outside the state "directly to the job site or place of business" in the Chicago area of the purchasing contractor (par. 13, R. 4). These materials "flow in a continuous, uninterrupted stream" from their out-of-state origins "to the site of their installation" in Chicago-area buildings (*ibid.*).

Plastering contractors are "conduits" through which plastering materials shipped from other states are sold and distributed to the consuming public in the Chicago area, and these materials "flow in a continuous, uninterrupted stream * * * to their places of installation and use in buildings in the Chicago area" (par. 14, R. 4). The service

of sale and installation performed by plastering contractors "is an integral part of, and necessary to," this interstate movement. The plastering operation is also an integral part of the building construction industry and necessary to the completion of numerous further building operations, including installation of a wide variety of materials and products. Substantial quantities of such materials and products incorporated in buildings constructed in the Chicago area "flow in a continuous uninterrupted stream from their points of origin in States other than Illinois to the places of installation and use" in Chicago-area buildings. (Pars. 15–16, R. 4–5.)

Any restraint upon or interference with the performance of plastering work in the Chicago area "necessarily and directly restrains and affects the interstate flow of plastering materials," and constitutes "a direct and substantial burden and restraint upon the interstate flow" of other materials entering into the construction of buildings in that area (par. 17, R. 5).

A number of plastering contractors domiciled outside the State of Illinois specialize in performing large construction jobs in various states. In carrying out their plastering contracts, these firms place orders for shipment of materials to job sites in different states, transport supervisory employees to such sites, and exercise control and supervision from their home offices over per-

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formance of contracts in other states. Interference with their ability to enter into or perform plastering contracts in the Chicago area restrains interstate trade and commerce. (Par. 18, R. 5.)

Appellees and their co-conspirators [7] are parties to a conspiracy, beginning about 1938, to suppress competition among plastering contractors in the Chicago area, and to restrict and exclude persons from engaging in this business, in unreasonable restraint of the interstate commerce previously described (par. 19, R. 5).

As a part of this conspiracy, appellees have agreed (a) that no person be permitted to engage in the plastering contracting business in the Chicago area without securing the approval of Local 5 and its president; (b) that Local 5 refuse to allow its members to work for any plastering contractor who has not received such approval; (c) that a plastering contractor may not change its "form of business organization" without securing the approval of Local 5 and its president; (d) that no Association member work on a job with respect to which the general contractor has an unresolved dispute with another plastering contractor; (e) that Local 5 and its president aid in enforcing the foregoing agreement by instituting work slowdowns and other harassing tactics; (f) that out-of-state plastering contractors be ex-

[7] The complaint names as co-conspirators numerous plastering contractors in the Chicago area, including contractors who are members of the Association (par. 5, R. 2).

cluded from the Chicago area; and (g) that Local 5 institute work slowdowns and employ other harassing tactics to keep out-of-state plastering contractors from operating in the Chicago area (par. 20, R. 6).

To implement their conspiracy, appellees have adopted and enforced numerous specific rules, regulations and procedures which they have enforced by means of boycotts, fines, work slowdowns, harassment and intimidation. They have employed such means to compel Association members, general contractors, and out-of-state plastering contractors to adhere to the terms of the conspiracy, and to control and limit the business of plastering contracting in the Chicago area. (Pars. 21–28, R. 6–8.)

The following are among the means so used in effectuating the conspiracy:

No plastering contractor may secure union labor in the Chicago area or perform plastering contracts on union jobs without securing the approval of a special Contractors Examining Board established by Local 5 and composed exclusively of the Local's officers and members. To obtain such approval, a plastering contractor must have been a member of Local 5 for at least five years. (Par. 22, R. 6–7.)

The Association and Local 5 have incorporated into a joint agreement a so-called "original contractor" rule, under which plastering contractors in the Chicago area agree to refuse to enter into

a plastering contract with a general contractor on any job on which another plastering contractor has started work or received a contract unless the latter gives his consent. The rule prevents a general contractor who has a dispute with the original plastering contractor from obtaining the services of another plastering contractor, and thus forces the general contractor to accede to the demands of the original plastering contractor. (Par. 25, R. 7.)

Appellees have systematically followed the policy of preventing and discouraging all out-of-state union contractors from seeking or performing plastering contracts in the Chicago area, and this policy has been enforced by work slowdowns, fines on union labor, intimidation, and other means. Appellees have been so successful in excluding out-of-state plastering contractors from the Chicago area by use of such tactics that for nearly 20 years no such contractor has undertaken to perform a plastering contract in the Chicago area except for one veterans hospital, one federal housing project, and one state hospital. (Par. 28, R. 7–8.)

The conspiracy has had the following effects, among others: entry into the plastering business in the Chicago area has been impaired and thwarted, and competition in the business restrained; the right of out-of-state plastering contractors to perform work in the Chicago area has been impeded; the cost of building construction

in that area has been artificially enhanced; and the interstate flow of building materials, including plastering materials, has been unlawfully restrained (par. 29, R. 8).

SPECIFICATION OF ERRORS TO BE URGED

The district court erred—

1. In holding that the allegations of the complaint do not show a restraint of interstate commerce.

2. In holding that, under the allegations of the complaint, the conspiracy which it sets forth operates only upon commerce which is intrastate.

3. In adjudging that the complaint fails to state a claim upon which relief can be granted.

4. In entering judgment dismissing the complaint.

ARGUMENT

The conspiracy set forth in the complaint is in unreasonable restraint of interstate commerce

1. We have set forth in the Statement the allegations of the complaint which show how the major part of the plastering materials installed in buildings in the Chicago area moves from states other than Illinois to the plastering contractors who do the work of installation. The allegations relating to this interstate movement directly parallel those of the complaint in the *Employing Lathers Association* case, No. 439, this Term. For the reasons set forth in our brief in that case (pp. 17–20), we think it clear

that the movement of plastering materials in this case continues to be in interstate commerce until the materials reach the contractors.

Insofar as in No. 439 the allegations pertinent to continuity of interstate commerce differ from those in the present case, the latter show even more clearly an unbroken stream of commerce to the plastering contractors. Plastering materials move in interstate commerce to these contractors, who order the materials after having contracted to furnish and install them, whereas in No. 439 the movement also involves delivery of materials ordered by plastering contractors to the lathing contractors to whom the plastering contractors have subcontracted the job of installation.

It should be noted, moreover, that the complaint in the present case sets forth an element of interstate commerce not found in No. 439. It charges appellees with having systematically followed the policy of preventing and discouraging out-of-state plastering contractors from seeking or performing plastering contracts in the Chicago area, with the result that, during a period of nearly twenty years, out-of-state contractors have undertaken to perform only three plastering contracts in the Chicago area (par. 28, R. 7–8). The out-of-state contractors, who engage in performing plastering contracts in many states, specialize in large construction jobs (par. 18, R. 5). They carry out their contracts from home offices located outside of Illinois, by placing orders for shipment

of building materials to job sites in different states and by transporting to these job sites mechanical and supervisory employees (*ibid.*). When these concerns undertake local plastering contracts, this activity clearly constitutes "an integral part" of an interstate business. *Howell Chevrolet Co.* v. *National Labor Relations Board,* No. 34, this Term, decided December 14, 1953; *United States v. South-Eastern Underwriters Association,* 322 U. S. 533, 541–542, 545. It is clear that the movement of men and materials by out-of-state contractors into the Chicago area constitutes interstate commerce and that restraints on such movement restrain commerce. Thus, in *Electrical Workers* v. *National Labor Relations Board,* 341 U. S. 694, sustaining the Labor Board's finding that unfair labor practices in connection with building activities affected interstate commerce, the Court pointed out that (p. 699)—

> the contractor and both subcontractors in the instant case had their principal places of business in New York. The performance of their contractual obligations on this project in Connecticut accordingly emphasizes the interstate movement of the services and materials which they here supplied.

Similarly here, when appellees employ work slowdowns and intimidation to prevent the out-of-state contractors from carrying on their interstate operations in the Chicago area (par. 28, R. 7), this is a forbidden restraint of interstate commerce.

2. In Point B in our brief in No. 439 (pp. 20–25), we urge that, under applicable principles and decisions, the allegations as to the effect of the conspiracy on interstate commerce show illegal restraint of such commerce, irrespective of the precise point at which incoming shipments of lathing materials cease to be "in" interstate commerce. In view of the corresponding allegations of the complaint in the instant case (pars. 17, 29 (c), (d), R. 5, 8), we adopt and rely upon that argument here.

3. Appellees' conspiracy, like that in No. 439, substantially limited the outlets within the Chicago area for interstate sales and shipments. The conspiracy barred any person from engaging in the business of plastering contracting in the Chicago area unless he first secured the approval of Local 5 and its president, and the Local declined to approve any person who had not been a member of the Local for at least five years (pars. 20 (a), 22, R. 6–7). For the reasons stated in our brief in No. 439 (pp. 25–31), such a conspiracy illegally restrains interstate trade.

A further illegal restraint of trade resulted from the agreement of the Association members to do no work on a job respecting which the general contractor had an unresolved dispute with another plastering contractor (pars. 20 (d), 25, R. 6–7). This restraint is precisely analogous to that condemned in *United States* v. *First National Pictures, Inc.*, 282 U. S. 44. In that case the

leading distributors of motion picture films agreed that each transferee of a motion picture theater should be asked whether he was assuming the uncompleted film exhibition contracts of his predecessor, and further agreed that, unless the transferee reported that he was assuming such contracts, no new exhibition contract would be made with him until he had deposited an agreed sum as security for performance of his future exhibition contracts. Thus, as in the present case, an agreement not to deal was used as a means of aiding individual members of the combining group in their contract relations with outsiders. The finding of illegality in the *First National* case applies here.

In addition, the present appellees, as a part of their conspiracy, agreed that a plastering contractor who had been approved by Local 5 would not be permitted to alter the membership or management of his firm or to organize as a corporation without first securing the approval of Local 5 and its president (pars. 20 (c), 24; R. 6, 7). This exercise of control over the manner in which plastering contractors might conduct their business is a restraint fully as drastic as many other restraints which have been held to violate the Sherman Act. This Court has held illegal an agreement to limit the places at which customers will be offered the convenience of stored stocks of sugar (*Sugar Institute, Inc.* v. *United States,* 297

U. S. 553, 591–592); agreement to fix the maximum time for taking delivery under purchase contracts (*id.* at 593); agreement to include in contracts for the exhibition of motion picture films uniform provisions for the arbitration of disputes growing out of these contracts (*Paramount Famous Lasky Corp.* v. *United States,* 282 U. S. 30); and agreement to include in such contracts a prohibition against showing two feature films for the price of one admission (*Interstate Circuit, Inc.* v. *United States,* 306 U. S. 208).[8]

4. In conclusion, we point out that the charge made in this case is not within any immunities granted by the Clayton Act. The complaint explicitly alleges combination between a labor organization and a business group,[9] and the Clayton Act exemptions do not apply when a labor organization combines with a business group to effect a restraint or monopolization of trade within the purview of prohibitions of the Sherman Act. *Allen Bradley Co.* v. *Local Union No.*

[8] While the conspiracy in the *Interstate Circuit* case involved prohibiting double billing and requiring a minimum admission charge, and this Court discussed the illegality of the restraint in the latter connection (306 U. S., at pp. 230–232), it affirmed a decree which barred restriction on double billing and thus adjudicated the illegality of this restriction.

[9] The latter consists of numerous plastering contractors doing business in the Chicago area, who are charged with being parties to the conspiracy (pars. 5, 19; R. 2, 5), and an association whose members are 39 of such contractors.

3, 325 U. S. 797; *United Brotherhood of Carpenters* v. *United States,* 330 U. S. 395, 400.

The motion to dismiss or affirm which the Association filed in this Court suggested that a labor organization is outside the Clayton Act exemptions only when it combines with a group composed of both contractors *and* manufacturers. Neither the reasoning nor the language of the Court in the *Allen Bradley* case gives this suggestion any support. The reasoning was that the Sherman Act operates in the field of trade and commerce, and that when a labor organization joins with those engaged therein to achieve ends against which the Sherman Act is directed, its action is not within the purpose of Congress in permitting the members of labor organizations to act in unison against employers in achieving ordinary labor objectives. The broad language of the Court was that the Clayton Act does not give exemption when a labor organization combines with "business men to restrain trade" (p. 807), participates to this end "with a combination of business men" (p. 809), and aids "business groups" to frustrate objectives of the Sherman Act (p. 810); and that violation of that Act by labor union action depends upon whether the union acts alone or "in combination with business groups" (*ibid.*). See also *United States* v. *Hutcheson,* 312 U. S. 219, 232; *United States* v. *Women's Sportswear Assn.,* 336 U. S. 460, 464.

CONCLUSION

For the foregoing reasons, the judgment of the district court dismissing the complaint should be reversed.

Respectfully submitted.

ROBERT L. STERN,
Acting Solicitor General.
STANLEY N. BARNES,
Assistant Attorney General.
CHARLES H. WESTON,
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Special Assistants to the Attorney General.

JANUARY 1954.

U. S. GOVERNMENT PRINTING OFFICE: 1954

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 440

UNITED STATES OF AMERICA,
Appellant,

vs.

EMPLOYING PLASTERERS ASSOCIATION OF CHICAGO, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

STATEMENT OF APPELLEE, EMPLOYING PLASTERERS OF CHICAGO, OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

HOWARD ELLIS,
THOMAS M. THOMAS,
DON H. REUBEN,
Counsel for Appellee.

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. 52 C 1640

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

vs.

EMPLOYING PLASTERERS ASSOCIATION OF CHICAGO, JOURNEYMEN PLASTERERS' PROTECTIVE AND BENEVOLENT SOCIETY, LOCAL NO. 5, O. P. & C. F. I. A., AND BYRON WILLIAM DALTON,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

STATEMENT OF APPELLEE, EMPLOYING PLASTERERS ASSOCIATION OF CHICAGO, IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

Pursuant to Rule 7, par. 3 and Rule 12, par. 3 of the Rules of the Supreme Court of the United States, appellee, Employing Plasterers Association of Chicago, submits the following statement in opposition to appellant's statement

as to jurisdiction, and moves to dismiss the appeal or affirm the final judgment of the District Court.

I. Jurisdiction

The appellant, to obtain a review of the decision of the district court by this court, invokes Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. Section 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869.

II. Question Presented

Whether a substantial question is presented to this Court when the district court holds that the activity of plastering walls by residents of the Chicago area in structures exclusively located in the Chicago area is not within the purview of the Sherman Act because the activity is local in character and has no effect upon commerce.

III. Statute Involved

The pertinent provisions of Sections 1, 2 and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended (15 U. S. C. 1, 2 and 4) commonly known as the Sherman Act, are as follows:

> Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.
>
> Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine, or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *.
>
> * * * * * * *

Sec. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * *

IV. Statement of the Case

Appellant, plaintiff below, is appealing from an order granting the three defendants-appellees' motion to dismiss this action for failure to state a violation of the Sherman Act because of an absence of an effect upon commerce. The defendant, Employing Plasterers Association of Chicago, is a non-profit corporation composed of 39 of the approximately 140 plastering contractors who reside and carry on plastering activities in the Chicago area. Defendant, Journeymen Plasterers' Protective and Benevolent Society, Local No. 5, O. P. & C. F. I. A., is a trade union whose membership consists of journeymen and apprentice plasterers who live and work in the Chicago area. Defendant, Byron William Dalton, is president of Local No. 5.

The complaint filed by the appellant alleges that the defendants engaged in a conspiracy to restrain the trade of plastering in the Chicago area and to monopolize the marketing of plastering materials that are utilized in the performance of plastering contract work in the Chicago area. Various overt acts are alleged to have been perpetrated in the furtherance of the conspiracy and the appellant's complaint concludes that the activities of the defendants have had certain effects upon competition among plastering contractors in the Chicago area.

Since all of the activities of the defendants are within the Chicago area, an attempt has been made to imbue their actions with interstate characteristics by tracing the flow

of plastering materials into the State of Illinois and by charging that out-of-state plastering contractors are dissuaded from entering the Chicago market. Paragraph 11 of the complaint asserts that plastering contractors purchase material from local dealers who have acquired the goods from out-of-state sources. Some of these acquisitions are said to be pursuant to prior orders of the contractors. Paragraph 12 of the appellant's complaint alleges that some plastering materials are acquired by local dealers to meet regular anticipated demands of plastering contractors, and Paragraph 13 states that frequently material dealers request out-of-state suppliers to ship directly to the job site for the use of the plastering contractor. Paragraph 14 concludes that these defendants who skillfully combine the various materials purchased into an infinite number of different types and consistencies of plaster and construct with the products so produced walls, ceilings and ornamentation in the various structures located in the Chicago area are merely "conduits through which plastering materials manufactured and shipped from States other than the State of Illinois are sold and distributed to the consuming public in the Chicago area."

Absent from the complaint are any well pleaded allegations that either the flow of or market price of plastering and other construction materials imported into Illinois is affected by the alleged activities of the defendants or that the defendants so intended. All the alleged effects of the conspiracy are admitted to accrue in the Chicago area and even these effects are not charged to have reduced building in the Chicago area or to have driven industry elsewhere.

V. Opinion Below

The opinion below is unreported. It is reprinted in full as Appendix A annexed to the appellant's Statement as to Jurisdiction.

The district court (Perry, J.) accepted all of the well pleaded allegations of the complaint as true and dismissed the action. He found that the complaint contained a charge of "local restraint and monopoly by local labor and a local lathers[1] association, all confined to three counties in the State of Illinois. The alleged restraints do not become associated with the building material or ultimate cost of buildings until after the building materials have been purchased and have come to a state of rest in the State of Illinois, so far as the stream of interstate commerce is concerned." The court further noted that it was pure speculation to assume that there was any restraint whatsoever upon the flow of commerce.

The district court found it unnecessary to pass upon other objections made to the complaint. These objections were grounded upon the fact that all of the alleged overt acts were legitimate union activities within the penumbra of the labor exemptions of the Clayton Act.

VI. ARGUMENT

(a) The Complaint Fails to Charge a Burden upon Commerce

The district court's decision presents no substantial question to this court for its ruling is in strict conformity with the established principles articulated by past decisions.

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[1] The district court used a companion case against Chicago lathers as a basis for articulating his decision and stated that his "discussion relative to the lathing industry is equally applicable to the plastering trade and one opinion will serve for all of the cases at bar."

The appellant's complaint charges only a restraint upon the use of goods after they have reached their destination and not a restraint upon the flow of goods still in commerce. In *Levering & Garrigues Co.* v. *Morrin*, 289 U. S. 103, 53 S. Ct. 549, 77 L. Ed. 1062, the court held that while the latter is a violation of the Sherman Act, the former is not. Because the construction industry concerns itself with the use of goods after they have reached their destination, the industry has always been held to be local in character and cases are legion holding that a conspiracy aimed at controlling a local building market is not a violation of the Sherman Act. *Industrial Association of San Francisco* v. *United States*, 268 U. S. 64, 45 S. Ct. 403, 69 L. Ed. 849; *Levering & Garrigues Co.* v. *Morrin*, 289 U. S. 103, 53 S. Ct. 549, 77 L. Ed. 1062; *National Fireproofing Co.* v. *Mason Builders' Assn.*, 169 F. 259, *Albrecht* v. *Kinsella*, 119 F. 2d 1003, *United States* v. *San Francisco Electrical Contractors Assn.*, 57 F. Supp. 57. In fact, in *Albrecht* v. *Kinsella*, 119 F. 2d 1003, allegations similar to those in the appellant's complaint were held not to state a cause of action under the Sherman Act against comparable defendants—an association of plastering contractors, a labor union of plastering journeymen and an executive of that union.

The decisions relied upon by the appellant to sustain its complaint are inapposite here for they all concern themselves with restraints upon goods that have not reached their destination. It is also noteworthy that none of the cases cited in the Statement of Jurisdiction concern a local construction industry.

The court below also properly held that the allegations of restraint of commerce were speculative. The complaint describes a conspiracy to control a construction market in the Chicago area and concludes that there is thus a restraint of trade. The reported decisions, however, indicate that

such conclusions will not save the complaint if the well pleaded allegations fail to state a cause of action within the Sherman Act. *Mitchell Woodbury Corporation* v. *Albert Pick-Barth*, 36 F. 2d 974; *Glenn Coal Co.* v. *Dickinson Fuel Co.*, 72 F. 2d 885; *Feddersen Motors, Inc.* v. *Ward*, 180 F. 2d 519. The district court thus properly held that the signal failure to set forth a burden upon commerce is not corrected by the appellant's sweeping charges and generalizations.

In the jurisdictional statement filed in *United States* v. *Employing Lathers' Association*,[2] it is noted that a trade union is made party to this action, but the appellant asserts, citing *Allen Bradley* v. *Local Union No. 3*, 325 U. S. 797, that since a conspiracy is charged the labor exemptions of the Clayton Act are inapplicable. A reading of that decision does not support the proposition that the impact of this court's holding in *United States* v. *Hutcheson*, 312 U. S. 219, can be obviated and pleadings made unassailable merely by alleging a conspiracy. In the *Allen Bradley* decision the union defendant entered into a conspiracy that included electrical contractors *and* electrical manufacturers. For aught that appears here the alleged agreement between the defendants is the product of legitimate and *bona fide* collective bargaining.

(b) The Appeal Subverts the Purposes of the Expediting Act

As is indicated in page 1 of the appellant's jurisdictional statement, a companion criminal case involving the identical issue here has been appealed to the Circuit Court of Appeals for the Seventh Circuit. In the normal course of

[2] Although this statement was not served upon these defendants, it is incorporated by reference to the jurisdictional statement filed in this case. Upon the request of counsel it was submitted informally on September 25, 1953.

events it will be reached for argument in January 1954. The policy of the Expediting Act might be better served if that case were permitted to proceed, thus giving the appellant an earlier hearing on the claimed errors of the district court. It is not inconceivable that the Seventh Circuit's ruling will eliminate this Court's acting in other than a summary manner.

If there is need for expedition, it is more than passing strange that any appeal was taken at all. The appellant should then have amended its complaint instead of choosing to have this Court rule upon the diaphanous commerce allegations contained in the complaint. If commerce has been affected, it would have been an easy matter to amend and state that effect with some degree of definiteness. Even now a new suit could be filed which does so. It is submitted that to delay obtaining relief until this Court passes upon mere matters of pleading containing allegations of the most scanty nature is to use the Expediting Act in a manner not contemplated by Congress.

For the foregoing reasons we submit that this Court should dismiss the appeal or affirm the court below.

Respectfully submitted,

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(1288)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 440

UNITED STATES OF AMERICA,
Appellant,

vs.

EMPLOYING PLASTERERS ASSOCIATION OF CHICAGO, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

BRIEF FOR APPELLEE EMPLOYING PLASTERERS ASSOCIATION OF CHICAGO.

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January, 1954.

THE BLAKELY-WARREN PRINTING COMPANY, CHICAGO

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IN THE

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No. 440.

UNITED STATES OF AMERICA,
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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

BRIEF FOR THE APPELLEE EMPLOYING PLASTERERS ASSOCIATION OF CHICAGO.

OPINION BELOW.

The opinion of the court below (R. 17), the District Court for the Northern District of Illinois (Perry, J.), is unreported.

JURISDICTION.

The District Court on January 20, 1953, entered an order granting the appellees' motion to strike the appellant's complaint and dismiss the action (R. 20-21). Thereupon, on September 18, 1953, the appellant, invoking Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C., Section 29, as amended by Section

17 of the Act of July 25, 1948, 62 Stat. 869, procured an order of the District Court allowing an appeal to this Court (R. 21-22). This Court denied the appellees' motion to dismiss the appeal or affirm the conviction below and noted probable jurisdiction of the cause on November 30, 1953 (R. 24).

QUESTION PRESENTED.

The defendants are charged with conspiring to restrict persons from engaging in the business of furnishing and installing plastering materials in the Chicago area. There are no allegations in the complaint showing how or to what extent this has affected the flow in interstate commerce of plastering materials. There are no allegations that the quantity, quality, kind or price of plastering materials in the flow of commerce have in any way been affected. The question presented is whether the sum of the complaint's allegations with respect to restraint of competition in the installation of plaster totals a restraint upon the flow of plastering materials in violation of Section 1 of the Sherman Act.

STATUTE INVOLVED.

The germane portions of Sections 1 and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended (15 U. S. C. 1 and 4), commonly known as the Sherman Act, are as follows:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.
>
> * * * * *

SEC. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * *

STATEMENT.

With one exception, the Government's "statement" is substantially accurate.

At page 4 the Government states that "the complaint charged the defendants with conspiring to restrain interstate commerce in plastering materials shipped from outside the state of Illinois for installation in buildings in the Chicago area." This we deny. There is in terms no such allegation in the entire complaint. The very issue before the Court is whether the sum total of the allegations of the complaint constitute such a charge.[1]

The Government's statement also includes reference to all of the significant allegations of the complaint. We feel it should be made clear, however, rather than buried in a footnote, that there are 140 plastering contractors in the Chicago area, only 39 of whom belong to the defendant Association.

---

1. It is alleged that one of the effects of the conspiracy has been that the flow in interstate trade and commerce of plastering materials "has been unlawfully restrained." (Par. 29, R. 8.) But this, we say, is a pure conclusion that cannot aid the complaint if it is otherwise defective.

The Government does state, and it is alleged (Par. 17, R. 5), that any restraint upon the performance of plastering work in Chicago necessarily and directly restrains and affects the interstate flow of plastering materials, but again we say that this is a pure conclusion.

SUMMARY OF ARGUMENT.

The business of plastering contractors, as alleged in the complaint, is peculiarly local and particularly adapted to local regulation and control. Conceding a flow in commerce to such contractors of plastering materials, the alleged restraints do not show a violation of Section 1 of the Sherman Act.[2] Agreements in the building trades relating solely to what persons can or will work and under what conditions have always been held to be outside of the Act. *National Fireproofing Co.* v. *Mason Builders' Ass'n*, 169 Fed. 259 (C. A. 2, 1909); *Industrial Ass'n* v. *United States*, 268 U. S. 64; *Levering & G. Co.* v. *Morrin*, 289 U. S. 103; *United States* v. *San Francisco Electrical Cont. Ass'n*, 57 F. Supp. 57 (N. D. Calif., 1944); *Albrecht* v. *Kinsella*, 119 F. 2d 1003 (C. A. 7, 1941). These holdings are bottomed on the sound doctrine that local government is in the best and most appropriate position to police local construction activities.

Conceding that purely local restraints can violate the Act, the complaint at bar signally fails to allege any ultimate facts showing an effect on interstate commerce, the *sina qua non* to such a violation. A local restraint must have a substantial and adverse effect on commerce before it offends against the Sherman Act. *Mandeville Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219. The commerce here charged to have been restrained is in plastering materials.[3] The complaint contains no allegation that the quantity, quality, kind or price of such materials flowing into the state of Illinois have been in any wise affected as a result of the alleged conspiracy. It is therefore impos-

2. The charge of violation of Section 2 of the Sherman Act has been abandoned by the Government. Its Brief, No. 440, p. 4, n. 3.

3. Government's Brf., No. 440, pp. 2, 4.

sible to form a rational judgment as to whether there has been any substantial or adverse effect on the flow of such materials. The complaint thus plainly fails to state a cause of action and was properly dismissed by the District Court.

The conclusions pleaded in the complaint that interstate commerce has been restrained and burdened cannot cure its plain deficiencies in the allegation of ultimate facts essential to the statement of a cause of action. *United States* v. *Starlite Drive-In*, 204 F. 2d 419 (C. A. 7, 1953); *Feddersen Motors, Inc.* v. *Ward*, 180 F. 2d 519 (C. A. 10, 1950); *Glenn Coal Co.* v. *Dickinson Fuel Co.*, 72 F. 2d 885 (C. A. 4, 1934); *Mitchell-Woodbury Corporation* v. *Albert Pick-Barth Co.*, 36 F. 2d 974 (D. C. Mass., 1929), 286 U. S. 552; *United States* v. *Bay Area Painters and Dec. Joint Com.*, 49 F. Supp. 733 (N. D. Calif., 1943).

The Government seeks to avoid the impact of its failure to allege any effect upon the price, grade or flow of plastering goods by asserting an effect upon the number of local retail outlets for plastering goods. No reason or precedent, however, can justify the claim that a limitation upon an increase in retail outlets, the net effect of the defendants' acts with respect to outlets violates the Sherman Act. Cf. *Industrial Ass'n* v. *United States*, 268 U. S. 64. Past precedent holding local construction beyond the reach of the Sherman Act is still controlling so far as the present complaint is concerned. Cf. *United States* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293, 297. Reliance by the Government upon Labor Board cases in the anti-trust field is improper for Congress has delegated to the Labor Board all the powers it was granted by the commerce clause of the Constitution. *Polish Alliance* v. *Labor Board*, 322 U. S. 643, 647; *Labor Board* v. *Jones & Laughlin Corp.*, 301 U. S. 1, 31, and *Labor Board* v. *Fainblatt*, 306 U. S. 601, 607. The

Sherman Act is not, however, coextensive with the commerce clause. *Toolson* v. *New York Yankees, Inc. et al.*, No. 18, this Term, decided November 9, 1953; *United States* v. *Women's Sportswear Mfg. Ass'n*, 336 U. S. 460, 462; *United States* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293, 297; *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 486.

This is not a case where the court is faced with the difficult task of weighing alleged effects on interstate commerce to arrive at a determination as to whether they are sufficiently substantial to bring the Sherman Act into play. This is a case where no effects at all are alleged.

ARGUMENT.

The Complaint Fails to Allege Any Facts Constituting a Restraint of Trade or Commerce in Violation of the Sherman Act.

Taken at its best, the essence of the complaint held inadequate by the lower court is that plastering materials flow in interstate commerce to plastering contractors; that by conspiracy an increase in their numbers has been restricted, the right to change their form of business organization limited, and competition between them restrained where one of their number has a dispute with a general contractor (Par. 20, R. 6). By way of conclusion it is alleged that these limitations restrain and burden commerce in plastering materials.

Because government counsel have attempted to treat the two matters as involving virtually identical charges and issues and in effect file a joint brief in the two matters, we feel it incumbent on us to point out that the gravamen of the charge in this case is strikingly different from that made in No. 439. There it is alleged that the number of lathing contractors has been sharply reduced, all competition between them eliminated, and the plastering contractors made victims of the alleged conspiracy.

Here materials are produced outside of the state of Illinois (Par. 10, R. 3). The producers are not alleged to be co-conspirators and there is no allegation that any producer has in any way been restrained or restricted in producing, selling or shipping materials into the state.

The materials are bought by dealers and by them sold to the contractors (Pars. 11-13, R. 3-4). The dealers are not alleged to be co-conspirators and there is no allegation

that any dealer has in any way been restrained or restricted in buying and selling materials.

The complaint is barren of any allegation that the quantity, quality, kind or price of the materials shipped into the state has been affected in any way whatsoever. The complaint even fails to allege the quantity and value of the materials shipped into the state.

Under these circumstances, we submit that the conclusion that commerce has been restrained and burdened is a *non sequitur,* adds nothing to the complaint, and does not cure its otherwise fatal defects.

We do not for a moment deny that plastering materials move within interstate channels; nor do we deny that the complaint here adequately alleges that interstate flow. We also readily concede that as a matter of law a complaint properly drawn can charge those engaged in local activity with restraining trade or commerce in violation of the Sherman Act. But we believe that the complaint here signally fails to charge these defendants with conspiracy to restrain in any manner the interstate flow of or commerce in plastering goods. The complaint describes only an agreement whose purpose and effect is to restrain the local trade of installing plastering materials.

A.

The installation of plastering materials is a local activity. Without more, restrictions on that activity do not violate Section 1 of the Sherman Act.

In the past, both this Court and lower federal courts have been asked to find local building tradesmen within Sherman Act sanctions. Invariably, however, the courts have held that the individual who assembles and shapes the raw materials he purchases into the buildings of his

community is not primarily the Federal Government's concern. Each decision reflects the wholesome attitude that the activities of the local building trades in purely local matters are peculiarly the problems of state and local governments—the bodies best able to supervise community building operation.

The earliest case holding the building trades to be local in operation is *National Fireproofing Co.* v. *Mason Builders' Ass'n,* 169 Fed. 259 (C. A. 2, 1909), where suit was brought because the plaintiff was precluded from entering the business of installing tile in the New York City area. The court held that an agreement relating to masonry work in New York City was not offensive to the Sherman Act because of a lack of an effect upon commerce. The net effect of the holding was to permit New York City to solve its own building construction problems, a task we submit it is still most appropriately able to do.

Chronologically, the next cases of importance that considered the applicability of Sherman Act provisions to local building are two opinions of this court, *Industrial Ass'n* v. *United States,* 268 U. S. 64 (1925), and *Levering & G. Co.* v. *Morrin,* 289 U. S. 103 (1933). The earlier case involved the activities of San Francisco contractors in the building trades who wished an "open shop" policy in their area. Any individual who did not adhere to an "open shop" policy was not permitted to purchase certain specified locally-produced building materials. This Court found the defendants not to be in violation of the Sherman Act, stating at page 82:

> The alleged conspiracy and the acts here complained of, spent their intended and direct force upon a local situation,—for building is as essentially local as mining, manufacturing or growing crops,—and if, by a resulting diminution of the commercial demand, interstate trade was curtailed either generally or in

> specific instances, that was a fortuitous consequence so remote and indirect as plainly to cause it to fall outside the reach of the Sherman Act.

In the present case the alleged conspiracy and the acts complained of spent their intended and direct force upon the persons who would be permitted to plaster a wall in the city of Chicago. It is not even alleged that there was any "resulting diminution of the commercial demand" for plaster and there is no allegation that there was any reduction in the interstate flow of plastering materials. All the more reason to conclude here that any restraint on commerce was fortuitous and "so remote and indirect as plainly to cause it to fall outside the reach of the Sherman Act."

In the latter of the two cases, *Levering & G. Co.* v. *Morrin,* a group of defendants were charged, as were those in the *Industrial Ass'n* and the *National Fireproofing* cases and as are the defendants here, with suppressing competition in a local industry. It was alleged that the defendants conspired to prevent various individuals from erecting structural steel in New York City and that such action violated the Sherman Act. This court apparently felt, however, that New York City was best able to handle problems of building within its corporate limits and held the defendants were not within the scope of the Sherman Act. The court said in that case (289 U. S. 103 at 107):

> Accepting the allegations of the bill at their full value, it results that the sole aim of the conspiracy was to halt or suppress local building operations as a means of compelling the employment of union labor, not for the purpose of affecting the sale or transit of materials in interstate commerce. *Use* of the materials was purely a local matter, and the suppression thereof the result of the pursuit of a purely local aim. Restraint of interstate commerce was not an object of

the conspiracy. Prevention of the local use was in no sense a means adopted to effect such a restraint. It is this exclusively local aim, and not the fortuitous and incidental effect upon interstate commerce, which gives character to the conspiracy. Compare *Bedford Cut Stone Co.* v. *Stone Cutters Assn.*, 274 U. S. 37, 46-47; *Anderson* v. *Shipowners Assn.*, 272 U. S. 359, 363-364. If thereby the shipment of steel in interstate commerce was curtailed, that result was incidental, indirect and remote, and, therefore, not within the anti-trust acts, as this court, prior to the filing of the present bill, had already held. *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344, 410-411; *United Leather Workers* v. *Herkert & Meisel Trunk Co.*, 265 U. S. 457. The controlling application of these cases to the present one is apparent from the review of them in the later case of the *Industrial Assn.* v. *United States*, 268 U. S. 64, 77-78, 80-82.

Accepting the allegations of the complaint before the Court at their full value, it results in the present case that the sole aim of the conspiracy was to place restrictions on persons who could plaster a wall in Chicago, and "not for the purpose of affecting the sale or transit of materials in interstate commerce." Substitute "plastering materials" for "steel" and everything the court said in the *Levering* case is perfectly applicable to the case at bar.

It does not distinguish or make inapplicable these two decisions to say that in the instant case the defendants "closed outlets which are an integral part of * * * the movement in interstate commerce" and "eliminated competition in procuring the services of those necessary to complete the interstate movement."[4] In the *Industrial*

4. Government's brief, No. 439, p. 31. The Government apparently deems these statements applicable to No. 440 (Its brief No. 440 p. 14). However, although "competition in procuring the services of those necessary to complete the interstate movement" of lathing materials may be charged to have been eliminated in No. 439, that is certainly not the case in No. 440.

Ass'n. case the very end sought by the conspirators was the elimination of union shop outlets, and which reduced competition in procuring services necessary to the completion of the interstate movement of materials. The result of the restraints on or reduction in number of those outlets was to reduce the flow into San Francisco of such out-of-state products as plumbing supplies. Denying validity to the Government's argument that the local conspiracy thus restrained the flow of interstate goods in violation of the Sherman Act, the court stated (268 U. S. 64 at 80):

> But this ignores the all important fact that there was no interference with the freedom of the outside manufacturer to sell and ship or of the local contractor to buy. The process went no further than to take away the latter's opportunity to use, and therefore, his incentive to purchase. The effect upon, and interference with, interstate trade, if any, were clearly incidental, indirect and remote,—precisely such an interference as this court dealt with in *United Mine Workers* v. *Coronado Co., supra,* and *United Leather Workers* v. *Herkert,* 265 U. S. 457.

In the *Levering* case the purpose of the conspiracy, the elimination of particular individuals from the business of erecting structural steel, again decreased the number of individuals handling structural steel imported into the New York area; but again the court found the defendant's activities beyond the reach of the Sherman Act. It should follow that a mere limitation on increase in the number of local outlets for interstate commodities, without more, is insufficient to constitute a Sherman Act violation.[5]

Two lower federal courts have recently considered Sherman Act suits against defendants whose activities paralleled those of the defendants herein. Both courts held to the

5. Cases cited by the Government on *reduction* of outlets are discussed post. pp. 28-29.

view that the Sherman Act did not authorize the Federal Government to arrogate to itself the local community's housing and construction problems. In *United States* v. *San Francisco Electrical Cont. Ass'n.*, 57 F. Supp. 57 (N. D. Calif., 1944), Yankwich, J., held that individuals who assembled and installed electrical systems in San Francisco were not engaged in commerce. The defendants performed operations similar to those done by the instant parties as they purchased materials imported from other states, combined them into a mass in accordance with submitted specifications, and then installed the product so constructed.

In *Albrecht* v. *Kinsella*, 119 F. 2d 1003 (C. A. 7, 1941), a plastering contractor sued defendants identical to those found here—a plastering journeymen's union, officials of that union and an association of plastering contractors—for allegedly excluding him from the Peoria, Illinois, market. The plaintiff there, like the appellant here, sought to create the impression of a restraint upon commerce repugnant to the Sherman Act by tracing the flow of goods used in the plastering industry from foreign states to the contractors in Illinois. The court, however, affirmed the district court's order dismissing the complaint, the late Judge Evans saying at page 1005:

> Because the effect upon interstate commerce is remote and merely incidental and the object of the conspiracy was not directed against such interstate trade, but wholly against local trade, we must, under the decisions, hold that the case falls outside these acts. *Levering & G. Co.* v. *Morrin*, 289 U. S. 103, 53 S. Ct. 549, 77 L. Ed. 1052; *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 60 S. Ct. 982, 84 L. Ed. 1311, 128 A. L. R. 1044.

We believe that there has been no change in our economic or political system that warrants a reversal of the

long-standing policy of recognizing that local officials have primary concern as to how construction goods are used within the states. The maintenance in our federal system of a proper distribution of police authority between state and national governments is of far-reaching importance. An intention to disturb the balance is not lightly to be imputed to Congress. *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 513 (1940).

The use of construction materials by local building tradesmen, such as these defendants, still results in the creation of the homes, factories and office buildings of the community. The building trades are still peculiarly connected with the physical growth, welfare and development of the local community. The local government's vital interest in this complex is today manifested not only in zoning ordinances and building codes regulating the use to which materials may be put, but in regulation, control and restriction of *those who may install the goods*[6]—the

6. E. g., the City of Chicago has the power to enact a building code, license and regulate electricians and electrical contractors and license and regulate plumbers and plumbing contractors. Ill. Rev. Stat. 1953, Ch. 24, §§ 70.1, 95; Ch. 111¼, § 116.50. Illustrative of restrictions on who can be electrical contractors and who can be plumbing contractors in Chicago is Municipal Code of The City of Chicago, Chapters 86 and 162. For an indication of the minutiae contained in building codes and their extremely detailed regulations and restrictions, see *National Building Code,* 1949 Ed., National Board of Fire Underwriters, 85 John Street, New York, N. Y.; *Uniform Building Code,* 1946 Ed., Pacific Coast Building Officials Conference, 124 West Fourth Street, Los Angeles, Cal.; *Basic Building Code,* Building Officials Conference of America, Inc., 1950 Ed., 51 East 42nd Street, New York. For an indication of the extent to which such codes have been adopted throughout the nation, see *Building Regulation Systems in the United States,* February, 1951, Housing and Home Finance Agency, Office of the Administrator, Division of Housing Research, U. S. Govt.

very heart of this alleged conspiracy! Thus if, as alleged (Par. 20, R. 6), these defendants are suppressing competition among those who use or install plastering materials in Chicago, then that city is the authority peculiarly suited to deal with the problem.

Further, as the decisions have pointed out, realistically speaking, if there is a restraint upon the installation of construction goods in a local area, any effect upon commerce is so remote and indirect as to be incapable of measurement. (This may well account for the absence of specific allegations on this subject in the present complaint.) The real pinch of such restraints is limited to the area in which they are found and manifested by higher building costs, a decrease in construction operations, a housing shortage or unemployment. When such evils do appear, it is the local, and not the Federal Government, constantly keeping a weather-eye upon local construction operations through the issuance of building permits, the enforcement of building codes and the *issuance of permits to individuals to ply a particular construction trade,* that is best able to evaluate and cope with the situation.[7]

The effect of the Government's appeal here is to ask the court to overrule long-standing precedent and shift the primary responsibility for regulating local building trades to the National Government despite the fact that building operations uniquely affect the local scene. Thus the way

7. If, as the Government alleges (Par. 29, R. 8), the effects of the defendants' conspiracy have been either to impair one's traditional American right to become a plastering contractor or deny the public the benefits of competition in the construction industry, it is the local governments who are best suited and equipped to police or correct the situation. *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469 (1940). An expansion of federal jurisdiction into local construction may create far greater evils than it will cure.

would be paved for the enactment of a federal building code or the licensing or policing of local journeymen and contractors by the Federal Government—both functions now the responsibility of the local community.

B.

The suppression of competition in the trade of installing plastering materials within the Chicago area does not warrant the complaint's conclusion that there has been restraint of or a burden on the flow of plastering materials in interstate commerce.

We believe it both obvious and demonstrated that the activity of plastering is purely local. We have conceded that a conspiracy to restrain a purely local activity can under certain circumstances violate the Sherman Act. The complaint here does allege a conspiracy to restrict increase in the number of persons that can participate in the local activity of plastering. It does allege a suppression of competition between plastering contractors in cases where there is a dispute between an original plastering contractor and a general contractor. It does allege a limitation on the right of contractors to change the form of their business organization. But these are the only restraints factually alleged. The issue thus is whether the complaint contains the allegations prerequisite to making such restraints of local activity a violation of Section 1 of the Sherman Act. We submit that the complaint is patently deficient in this regard.

The test of what the complaint must allege to state a cause of action may be found in *Mandeville Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219 (1948), cited and relied upon by the Government. There the court announced (p. 233) that "judgment as to practical impeding

effects'' on commerce had supplanted such rubrics as local, indirect, remote, incidental, primary, direct and the like. It said (p. 234) that ''given a restraint of the type forbidden by the Act, though arising in the course of intrastate or local activities, and a showing of actual or threatened effect upon interstate commerce, the vital question becomes whether the effect is sufficiently substantial and adverse * * * to constitute a forbidden consequence.'' In the application of this inquiry ''those situations in which no aspect of or substantial effect upon interstate commerce can be found in the sum of the facts presented'' are excluded as beyond the reach of the Act. Thus, since installing plaster is a purely local matter, the complaint to state an offense under the Sherman Act must allege facts showing more than a restraint on that local activity of installation—it must aver ultimate facts showing or constituting a substantial and adverse effect upon the interstate commerce in plastering materials. This it wholly fails to do.

There is no allegation in the complaint as to what the effect on the flow in commerce of plastering materials has been except the conclusory one that it has been ''unlawfully restrained.'' Surely this purely legal conclusion does not satisfy the *Mandeville Farms* test. Surely this does not spell out ''in the sum of the facts presented'' what the court can conclude is a ''substantial and adverse'' effect on the flow of plastering materials.

There is no allegation in the complaint as to the volume or dollar value of plastering materials flowing into the Chicago area.[8] There is no allegation as to whether any plastering materials have ever been prevented from flowing into the Chicago area. There is no allegation that the

8. There is an allegation that $15,000,000 worth of plastering business was done in 1951 (Par. 9, R. 3) but the complaint is silent as to what portion of this amount is represented by the cost or value of materials.

volume of such materials flowing into the area has been limited or reduced. There is no allegation that the prices of plastering materials have been in any way fixed or affected.[9] Absent such allegations, how can it be determined from the complaint whether there has been any effect on the flow of materials; let alone whether the effect has been substantial and adverse? Yet such a determination is essential to the basic issue of whether the complaint avers a restraint of sufficient import to offend against the Sherman Act. *Mandeville Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219 (1948); *United States* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293 (1945); *United States* v. *Women's Sportswear Mfg. Ass'n*, 336 U. S. 460 (1949).

The Government asserts that "the charge of effect on interstate commerce [is not] defective by reason of failure to set forth a precise blueprint or detailed catalogue of such effect,"[10] asserting that "the allegations here are at least as specific as those held to be adequate" in the *Mandeville Farms* case. This is simply not the fact. In that case there were allegations that the conspirators agreed to pay uniform prices for the commodity going into commerce and that they had eliminated competition among themselves with respect to the price of raw sugar in commerce. The court commented that "the allegations are comprehensive and, for the greater part, specific concerning both the restraints *and their effects*" (334 U. S. 219 at 246, emphasis ours).

The complaint alleges that plastering materials are purchased from building material dealers in the Chicago area, who in turn purchase such materials from out-of-state

9. It is alleged in the complaint that an effect of the conspiracy has been to increase the cost of building construction in the Chicago area (Par. 29, R. 8). But that construction is not a product in commerce.

10. Its brief, No. 439, p. 22.

sources (Par. 11, R. 3). The complaint does not allege that those dealers or their out-of-state sources are coerced, threatened, boycotted or influenced in any way; does not allege that they are a part of or the victims of the conspiracy. The complaint does not allege that their business has been hurt or their numbers reduced. The complaint does not allege any attempt to control the quality, quantity, kind or price of the materials bought and sold by such dealers. Neither does it allege that such is the actual or likely effect of the conspiracy. As the complaint presently stands, there is no justification for the inference that there is not free and open competition in the buying and selling of plastering materials in the Chicago area because of the alleged conspiracy over the installation of plastering materials.

The Government's apparent answer to this riddle of how commerce is affected because of an alleged suppression of competition among installers of plastering materials in Chicago is evidently the contention that outlets for plastering materials have been substantially limited.[11] The impression is sought that such a limitation has for many years been held to be within the Sherman Act. The short answer to such an argument is that in every case where this and other courts have found trade journeymen or local builders not in violation of the Sherman Act, there was not merely a limitation on increase as in this case but an actual reduction of outlets for goods flowing in commerce. But that decrease in local outlets, absent any allegation or showing as to effect on price or flow of goods in commerce, has consistently been held not to be within the prohibition of the anti-trust laws. *Industrial Ass'n* v. *United States,* 268 U. S. 64, 80 (1925). And none of the

11. Government's brief, No. 440, p. 14; Government's brief No. 439, p. 25.

cases cited by the Government[12] hold to the contrary. In each of those cases the defendants were alleged or proved to have affected the price or the quantity of goods flowing in interstate commerce. Here there is no allegation that defendants attempted to or did in fact in any way manipulate price or flow of plastering goods, or that that was the actual or probable consequence of their acts. In so far as appears from the complaint, the entire local demand for plastering materials can be purchased at a price established in a competitive market.

Thus, to say that because there has been suppression of competition among those who install plaster in Chicago there is a restraint upon trade or commerce in plastering materials is to leave a hiatus between the fact alleged and the conclusion drawn. No restraint upon plastering goods whatsoever is alleged in the complaint, and therefore the conclusion that a restraint of trade has occurred stands naked and unsupported.

Either the Government knows what the effects of the charged conspiracy are on the flow of plastering materials—in which event it should be compelled to allege them—or it does not. If it knows the effects and has not pleaded them, or if it does not know them, the lower court and the defendants may be put to a lengthy and ultimately needless trial. The report issued by the 1951 Judicial Conference, spotlighting the vexatious problems the federal courts are now confronted with because anti-trust causes tend to become trial marathons,[13] points up why pleadings in Sherman Act cases should be specific. Trial courts then may in many instances be able to dispose of anti-trust litigation upon the pleadings and prevent a case defective in

12. Its brief, No. 439, p. 28; discussed post. pp. 28-29.

13. Judicial Conference of the United States. *Procedure in Anti-Trust and Other Protracted Cases* (1951).

ultimate fact from clogging the docket by consuming days or months of trial before its imperfections are disclosed.

If, on the other hand, appellant has here pleaded all the ultimate facts, it is asking for an extension of the anti-trust laws into a virtually unlimited field of activity of the most intrastate nature. Once the complaint at bar receives judicial approval, then every enterprise and pursuit, no matter how local its scope, no matter how limited its operation, no matter how insubstantial its effect on commerce, is within the reach of the Sherman Act. Then the local barber, the local shoemaker or the local tailor is brought within the orbit of the Act. A complaint would suffice that set forth a restriction between local tradesmen, a description of their trade, allege they purchase for use or resale either hair tonic, leather, needle and thread, or the like, allege that such goods move in commerce, and conclude, without further allegation, that their actions restrain the interstate flow of the product they purchase for use or resale.

Upon the trial of our hypothetical tradesmen, the Government would, as it undoubtedly contemplated doing here, prove a flow of commerce into the defendants' hands, prove the local restrictions complained of, and then be entitled to a decree without proving that the former is affected by the latter. Nothing would be left for the jurisdiction of the local authorities or the state anti-trust statutes, for in today's complex economy there is not an individual earning a living who does not utilize or consume some good that has been in commerce. We therefore submit that the approval of the complaint herein signals the destruction of all distinction between intra and interstate commerce. The authority of the Federal Government may not thus be stretched to the point of destroying the distinction which the commerce clause itself establishes between commerce among the states and the internal commerce of a state. The distinction between what is national and what is local in

the activities of commerce is vital to the maintenance of our federal system.

This is not the first occasion where the Government has left a yawning chasm between the facts it pleads and the conclusion it draws that trade has been restrained. In the very recent decision of *United States* v. *Starlite Drive-In,* 204 F. 2d 419 (C. A. 7, 1953), a pleading identical in approach to that presented here was sharply disapproved. As here, all the defendants were residents of and earned their living in Cook County, Illinois. All were owners or operators of drive-in theatres and it was charged that they had conspired to set the price of admission into drive-in theatres in Cook County. The Government concluded, without any allegation of fact showing how or to what extent, that this agreement among the defendants restrained the flow of motion picture films in commerce. There was no allegation that film producers or distributors were co-conspirators or in any way the victims of the conspiracy. There was no allegation that the agreement related to the films. It was merely alleged that the effect was that "the flow" of films had been "substantially restrained."

In sustaining the District Court's dismissal of the complaint for a signal failure to connect the acts alleged with the restraint concluded, the Court of Appeals said at pages 420-421:

> The substance of defendants' argument is that the "effects" thus alleged are mere conclusions of the pleader, without basis in the factual allegations. Such being the case, the allegations entitled "Effects" are not admitted by the motion to dismiss. We agree with this reasoning. * * * A decision, therefore, simmers down to the narrow question as to whether the price-fixing agreement charged has or could have any appreciable effect upon the flow of films in interstate commerce. It appears that the theory which the government embraces carries it into a field of speculation

> and conjecture, as is epitomized by the legal effects which the indictment alleges. No facts are alleged and it is not reasonably discernible how or in what manner the condemned agreement affected commerce. Certainly there is no basis for a claim that the movement of films in interstate commerce was either enhanced or diminished or that any discrimination resulted either to exhibitors in the procurement of films or to their patrons in viewing the films. Distributors were as free to deal with exhibitors, and the latter were as unfettered in the procurement of film as they would have been in the absence of the charged conspiracy. The agreement had nothing to do with the price which the distributor received for its film or the price which the exhibitor paid for it. The agreement was between local parties and related solely to a business that was typically intrastate in its nature. We agree with the District Court in its conclusion that the indictment was defective for failure to state a cause of action.

Other lower federal courts have also held that allegations charging a combination and conspiracy to restrain interstate trade and commerce are purely conclusions and are to be disregarded unless supported by well-pleaded facts describing a restraint and its effect. *Mitchell Woodbury Corporation* v. *Albert Pick-Barth Co.*, 36 F. 2d 974 (D. C. Mass., 1929), 286 U. S. 552; *Glenn Coal Co.* v. *Dickinson Fuel Co.*, 72 F. 2d 885 (C. A. 4, 1934); *United States* v. *Bay Area Painters and Dec. Joint Com.*, 49 F. Supp. 733, (N. D. Calif., 1943); *Feddersen Motors, Inc.* v. *Ward*, 180 F. 2d 519 (C. A. 10, 1950). The court in the most recent of these cases, *Feddersen Motors, Inc.* v. *Ward*, had the following to say about allegations such as the appellant presents here (p. 522):

> It alleged that the defendants formed a combination or conspiracy in restraint of interstate commerce. It further alleged that they combined and conspired to force plaintiff out of business as a dealer in Hudson automobiles. It further alleged that defendants had

discriminated against plaintiff in certain respects. And it further alleged that the effect of the unlawful acts and practices on the part of defendants was to burden, obstruct, and unduly restrain interstate commerce and trade in new Hudson automobiles. But these were general allegations in the nature of conclusions, without any averment of specific acts from which it could be determined as a matter of law that defendants violated the act with harmful results to the public. No facts were alleged from which it could be determined as a matter of law that the contemplated purpose, tendency, inherent nature, or result of the conspiracy was that fewer automobiles moved in interstate commerce from Detroit, Michigan, into Colorado, or other destination; or that less Hudson automobiles were available for purchase in the markets, either in Colorado or elsewhere; or that the quality of the Hudson cars was lowered in any manner. The pleading was completely barren of any allegations from which it could be determined as a matter of law that the contemplated purpose, tendency, inherent nature, or result of the combination was to bring about any diminution in quantity or deterioration in quality of new Hudson automobiles moving in interstate commerce and sold to the public. Facts were alleged which tended to show that the conspiracy as contemplated and effectuated harmed plaintiff. But that was not enough. In addition, it was essential that the pleading allege facts from which it could be determined as a matter of law that the conspiracy contemplated or tended to restrain interstate commerce, with harmful effect to the public interest. Failing to contain allegations of that requisite nature, the pleading was insufficient in law to state a cause of action for which relief could be granted under the Act.

Stripped of the pure conclusion that trade and commerce has been restrained, the sum of the facts in the complaint totals a charge of suppression of the Chicago trade of applying plastering materials and nothing more. But this

court said in *Mandeville Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219, 234, that the Sherman Act is not concerned with a situation "in which no aspect of or substantial effect upon interstate commerce can be found in the sum of the facts presented." Thus we submit the complaint here is fatally defective.

C.

Neither the reasoning nor precedent relied upon by the Government can excuse or cure the complaint's failure to properly allege a restraint of commerce in violation of the Sherman Act.

We have urged that the complaint is defective because the activities of the defendants are local in character and there are no allegations showing that the alleged restraints on those activities substantially and adversely affect interstate commerce. The Government seeks to avoid the necessary consequence of such patent omissions in the complaint by the contention that the installation of plastering materials is so intertwined with the sale of plastering materials that a factual allegation of restraint upon the former entitles it to draw a legal conclusion of restraint upon the latter.[14] The complaint does allege that installation of plastering materials is integrally related to the sale and flow of plastering materials *for installation.* This allegation, however, does not require or lead to the conclusion that *any* restraint on installation necessarily affects that flow, let alone substantially or adversely. The particular restraints set out in the complaint in No. 440 are nowhere alleged to have reduced the total number of plastering contractors in Chicago, let alone reduced such number to

14. Government's brief, No. 439, pp. 16-25. The argument is not made in connection with the plastering industry but is made in No. 439 and then incorporated by reference into the Government's brief, No. 440, at pp. 11 and 14.

a point where they could not promptly handle the sum total of all plastering requirements in Chicago. Under such circumstances the allegations of restraint upon installation simply do not pose any effects on price, flow or marketing of the goods installed. A restraint upon the installation of goods may or may not cause a restraint upon commerce in the goods. We submit that this complaint, which describes merely the former, cannot without alleging more be said to have charged the latter.

Apparently as a substitute for allegations showing an effect upon the flow or price of plastering the Government suggests that the conspiracy in No. 440 "* * * like that in No. 439, substantially limited the outlets within the Chicago area for interstate sales and shipments."[15] We most respectfully submit that this comparison is grossly unfair and manifestly untrue. The alleged limitations upon those who might do lathing work in Chicago are not within gunshot of the restrictions alleged to exist in the instant case. In No. 439 the defendants are charged with consciously reducing the number of lathing contractors in Chicago by racial restraints, nepotism and a freezing of the number of plastering contractors who may engage in the trade of lathing.[16] Further, those defendants are alleged to have assigned particular lathing contractors to particular plastering contractors,[17] thus limiting a plastering contractor's customers for lath and absolutely eliminating any competition of any sort between lathing contractors. And finally it is alleged that as a result of the lathers' conspiracy, the number of lathing contractors in the Chicago area has been reduced from 95 to 36.[18] Nothing even re-

15. Government's brief, No. 440, p. 14.
16. Government's brief, No. 439, pp. 9-11.
17. Id. No. 439, pp. 9-11.
18. No. 439, Par. 29(a), R. 9.

motely comparable to these charges is found in the complaint at bar.[19]

The allegations in the instant complaint touching upon a restriction of outlets or restraints among the contractors are in sharp contrast to those in No. 439. It is here alleged that only those who have been members of Local No. 5 for five years may become plastering contractors, and that the defendants have excluded out-of-state plastering contractors from Chicago.[20] These allegations, at best, describe merely a limitation upon increase in the number of contractors and, consequently, outlets for plastering materials in Chicago. Although not clearly articulated in either of its briefs, the Government seems to be saying that the defendants offend the Sherman Act because of the limitation upon possible increase in the number of local outlets for plastering goods.[21] A number of decisions are cited[22] to support this contention that a limitation upon the possible increase of retail outlets violates the Sherman Act. None of the cases relied upon holds that the Sherman Act is offended when the *only* purpose and effect of the conspiracy is to limit an increase in local retail outlets for a commodity. Such a proposition is utterly inconsistent with the decisions of this court that construction as such

19. Throughout the Government's brief in No. 440 there are constant, and to us confusing, references to its brief in No. 439. Because of the many important differences in the two complaints, much that is said in the Government's brief in No. 439 has no application or relevancy to No. 440. In many respects it would seem that the Government is attempting to bolster its case in No. 440 by confusing it with No. 439. If there is any relationship between this case and No. 439, it is that the plastering contractors were one of the victims of the alleged lathing conspiracy.

20. Pars. 20, 22-28, R. pp. 6, 7.

21. See Government's brief, No. 439, pp. 27, 28.

22. Id., No. 439, p. 28.

is not within the Sherman Act, for the natural result of the acts of the defendants considered in such cases was always to restrict local outlets for a commodity. In each of the cases relied upon by the Government, however, there was something in addition to restriction of outlets that clearly brought the conspiracy into a forbidden field.

Thus in *Montague & Co.* v. *Lowry*, 193 U. S. 38 (1904), the first case cited by the Government, the defendants rigged the price of an interstate commodity and also boycotted out-of-state shippers of the commodity. *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20 (1912), also involved defendants who rigged the price of an interstate commodity, while *Eastern States Retail Lumber Dealers' Assn.* v. *United States*, 234 U. S. 600 (1914), was a suit against defendants who blacklisted particular out-of-state lumber dealers, preventing them from marketing their product across state lines. In short, all three of these cases involved allegations or proof of price fixing, exclusion of interstate commodities from a local market, or both.

The next case relied upon by the Government, *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U. S. 457 (1941), was a conspiracy of manufacturers engaged in interstate commerce to drive from the national market certain competing manufacturers and their product. *United States* v. *Crescent Amusement Co.*, 323 U. S. 173 (1944), is also inappropriate here as the conspiracy involved distributors of films in interstate commerce and exhibitors who had combined to impose restrictions on the distribution of that film to theaters in several states. *United States* v. *Yellow Cab Co.*, 332 U. S. 218 (1947), concerned defendants engaged in the taxicab business in Chicago who had successfully excluded competing cab companies from operating in the Chicago area. Having obtained this local monopoly, the defendants were alleged to have excluded

from the Chicago market all taxicabs except those manufactured by one of the defendant conspirators.

In *Lorain Journal Co.* v. *United States,* 342 U. S. 143 (1951), the defendant newspaper attempted to drive from business a local radio station. Had its efforts been successful, the interstate flow of electrical transcriptions, national radio advertising and radio news would not only have been disrupted, but completely excluded from any outlet and from the effective listening area of the broadcasting company. The *Associated Press* v. *United States* case 326 U. S. 1, (1945), involved an attempt by 1200 newspapers to stifle competition in the interstate business of collecting and disseminating news. The court found that the publishers who were part of the agreement subjected themselves to the control of the defendant association in the carrying on of this interstate business. Thus these two cases also offer no support for the proposition that merely by alleging a limitation upon the increase in number of local outlets for a commodity, a cause of action under the Sherman Act is set forth.

The Government briefly suggests that the alleged exclusion of out-of-state plastering contractors is in and of itself a burden upon interstate commerce.[23] It is difficult to see the pertinency to this case of an alleged exclusion of out-of-state plastering contractors in view of the Government's assertions that the complaint is concerned with a restraint upon interstate commerce in plastering materials.[24] If there is a restraint upon the materials, because of an alleged restriction of the number of local outlets for plastering goods, it is completely irrelevant as to where those local outlets might or might not be domiciled.

The Government's contention is bottomed on the conclu-

23. Government's brief, No. 440, p. 12.
24. Id., No. 440, pp. 2, 4.

sion that such contractors are in interstate commerce. The requisite ultimate facts to support that conclusion are not alleged. They are said to place orders "from" their home offices for the shipment of materials to job sites in different states (Par. 18, R. 5). But it is not alleged where they place such orders or whether such placing involves the crossing of state lines. It is averred that they arrange for financing from their home offices; but again it is not alleged that such arrangements are across state lines.

The only interstate activities alleged are that such contractors from their home offices transport mechanics and supervisory employees to job sites in other states and exercise "control and supervision" over contract performance in other states (Par. 18, R. 5). But these two activities do not constitute trade or commerce in the sense that either of those terms are used in the Sherman Act.

Men are not articles of commerce. Any contention that a restraint which decreases a flow of men is a violation of the Sherman Act is totally without precedent and contrary to all principles of our jurisprudence. See *Spears Free Clinic and Hospital* v. *Cleere*, 197 F. 2d 125 (C. A. 10, 1952). If restrictions upon the right of an individual to enter a state and ply his trade do exist, it is the civil rights statutes concerned with constitutional guarantees in that regard, rather than the Sherman Act concerned with commercial competition, that are offended. See *United States* v. *Williams*, 341 U. S. 70 (1950); Act of June 25, 1948, c. 645, 62 Stat. 696, Title 18, U. S. C., § 241.

Aside from the fact that a possible decrease in the use of interstate media as a result of the alleged restraint on supervision and control does not involve commercial competition as contemplated in the Sherman Act, the sum of the facts alleged here falls far short of the requisite ones for a determination that a substantial and adverse re-

straint has been accomplished or attempted. For all that appears in the complaint, the restraints of commerce affected are so insubstantial and insignificant as to be beneath the dignity of the anti-trust laws. Cf. *United States* v. *Women's Sportswear Mfg. Ass'n,* 336 U. S. 460, 462; *Mandeville Farms* v. *American Crystal Sugar Co.,* 334 U. S. 219, 234; *United States* v. *Frankfort Distilleries, Inc.,* 324 U. S. 293, 297-298; *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 494-495.

With the exception of *United States* v. *South-Eastern Underwriters Assn.,* 322 U. S. 533 (1943), all the decisions cited by the Government to support its contention that out-of-state contractors are within interstate commerce are Labor Board cases.[25] The Labor Board cases are not appropriate in this aspect of the anti-trust field.[26] The *Underwriters* case does not support such an assertion since at the very outset of that decision the court defined the scope of its opinion indicating it would only deal with the question of whether or not insurance ever fell within the Sherman Act. It was not even contended there that the insurance companies did not do an interstate business. (322 U. S. 533, 536-537.) In addition, the indictment there involved set out "in great detail" the total activities of the defendants. These "constituted a single continuous chain of events, many of which were multistate in character, and none of which * * * could possibly have been continued but for that part of them which moved back and forth across state lines." (322 U. S. 533, 537.) These allegations are as day to night in comparison with the single short paragraph in the present complaint on which the Government posits its conclusion that out-of-state contractors are engaged in interstate commerce. The few

25. Government's brief, No. 440, p. 13.

26. See pp. 35-36 *infra.*

decisions that have considered whether or not the origin of a contractor is controlling in determining whether or not he is engaged in commerce have rejected such a test. *Browning* v. *Waycross*, 233 U. S. 16 (1914); *Kansas City Steel Co.* v. *Arkansas*, 269 U. S. 148 (1925). We therefore submit that on the present complaint those who might enter the Chicago area to perform plastering contracts are not within commerce, and any discussion of their alleged exclusion is not germane to the only issue before this court of whether or not the complaint charged a restraint upon the flow of plastering materials.

Another alleged substantive act said to burden commerce is the alleged agreement among Association members to do no work on a job where the general contractor has an unresolved dispute with a plastering contractor. It is noteworthy that there is a signal failure to allege how frequently the defendants have refused to work for a general contractor with an unresolved dispute, or how frequently such unresolved disputes occur, or that the general contractors are themselves within commerce. The contention that commerce is burdened by this alleged act[27] is apparently made solely upon the authority of *United States* v. *First National Pictures, Inc.*, 282 U. S. 44 (1930), a case concerning a group of defendants engaged in interstate distribution of films who agreed to boycott particular exhibitors. The net effect of the case's holding is only that interstate distributors cannot agree among themselves not to sell to a particular individual, and we submit it is inapposite here.

The last alleged act the Government addresses itself to is the requirement that a plastering contractor obtain the approval of the defendant union before altering its membership, management or form of business organization.

27. Government's brief, No. 440, pp. 14 and 15.

There is a glaring lack of allegations charging that such approval is arbitrarily or capriciously withheld. In an effort to demonstrate that this alleged act offends the Sherman Act by burdening commerce, however, the Government cites three cases, *Sugar Institute, Inc.* v. *United States,* 297 U. S .553 (1936); *Paramount Famous Lasky Corp.* v. *United States,* 282 U. S. 30 (1930); *Interstate Circuit, Inc.* v. *United States,* 306 U. S. 208 (1939),[28] all of which involved interstate dealers in a commodity who combined to restrain competition among themselves by offering uniform conditions of sale. It is difficult to see the relevancy of these cases to a requirement that a union approve proposed changes in its employer's organizational structure if it is to continue to supply the employer with journeymen.

The precedent cited by the Government to sustain its complaint here, for the most part falls into three groups—recently instituted actions by it against the building trades, decisions that purportedly destroy the *Levering* and *Industrial Assn.* decisions as precedent, and decisions affirming a finding of the National Labor Relations Board that it has jurisdiction over particular unfair labor practices. The first group of cases, cited in No. 439,[29] the recently instituted prosecutions by the Justice Department, is offered to this court to demonstrate there is both need and precedent for permitting federal regulation of the local building trades. Suffice to say in answer to this line of "authority" that a more classic example of attempting to lift oneself by his own bootstraps is not to be found.

The first case in the group of decisions cited to soften the impact of the *Levering* and *Industrial Assn.* decisions, is *United States* v. *Frankfort Distilleries, Inc.,* 324 U. S.

28. Government's brief, No. 440, pp. 15 and 16.
29. Government's brief, No. 439, pp. 23 and 24.

293 (1945), and the Government quotes from that opinion as follows:[30]

> It is true that this Court has on occasion determined that local conduct could be insulated from the operation of the Anti-Trust laws on the basis of the purely local aims of a combination, insofar as those aims were not motivated by the purpose of restraining commerce, and where the means used to achieve the purpose did not directly touch upon interstate commerce.

We submit that this language patently applies and should control here. This is just such a case of local conduct insulated from the operation of the Anti-Trust laws. Here if ever are defendants with purely local aims: to place artificial limitations on the increase in the number of individuals who might install plaster in Cook County; to restrict the right of contractors to alter the form of their business organization; and to limit competition among themselves where one of their number has a dispute with a general contractor. Here, if ever, are defendants not motivated by the purpose of restraining commerce. Nowhere is it alleged that they attempted in any way to affect the price or flow of plastering materials. It is more than passing strange that the Government should find comfort in *Frankfort Distilleries.*

The other cases cited by the Government in its effort to circumvent the effect of the *Industrial Assn.* and *Levering* cases are equally wide of the mark.[31] *Ramsay Co.* v. *Bill Posters Assn.,* 260 U. S. 501 (1923), was a nationwide conspiracy of individuals who sought to fix prices and eliminate competition in their interstate business of advertising. *Mandeville Farms* v. *American Crystal Sugar Co.,* 334 U. S. 219 (1948), involved a conspiracy to fix the price

30. Government's brief, No. 439, p. 31.
31. Id., No. 439, p. 31.

of a commodity destined for interstate commerce—beet sugar. *Wickard* v. *Filburn,* 317 U. S. 111 (1942), is not even an anti-trust case. It involved the constitutionality of the Agricultural Adjustment Act of 1938. Dealing as it does with a question of Congressional power, its relevancy here is obscure.

The third group of decisions cited by the Government, the Labor Board cases, apparently are used because of the complete absence of any Sherman Act case holding local building operations to be in and of themselves within the anti-trust laws. The various decisions affirming a finding by the National Labor Relations Board that it had jurisdiction pursuant to the Wagner Act or the Taft-Hartley law over a particular unfair labor practice are used here to support two propositions: First, that the activity of constructing houses is within interstate commerce,[32] and Second, that plastering contractors not domiciled in Illinois but who might work in Illinois are within interstate commerce.[33] We submit that a decision by this court sustaining the National Labor Relations Board's jurisdiction or the power of Congress to confer it is simply not in point in the present aspect of the anti-trust field. "Congress in order to protect interstate commerce from adverse effects of labor disputes has undertaken to regulate all conduct having such consequences that constitutionally it can regulate." *Polish Alliance* v. *Labor Board,* 322 U. S. 643, 647 (1944); *Labor Board* v. *Jones & Laughlin Corp.,* 301 U. S. 1, 31 (1936), and *Labor Board* v. *Fainblatt,* 306 U. S. 601, 607 (1938). Such, however, is not true in the anti-trust field where activities restraining trade that constitutionally might be regulated by the Congress are without the scope of the Sherman Act either because of a lack of substantial effect upon commerce or because of the

32. Government's brief, No. 440, p. 15.

33. Id., No. 440, p. 13.

nature of the business or industry involved. *Toolson* v. *New York Yankees, Inc., et al.*, No. 18, this Term, decided Nov. 9, 1953; *United States* v. *Women's Sportswear Mfg. Assn.*, 336 U. S. 460, 462 (1949); *United States* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293, 297 (1945); *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 486 (1940).

An attempt to apply Sherman Act law to *National Labor Relations Board* v. *Denver Building Council*, 341 U. S. 675 (1951), one of the cases relied upon by the Government, illustrates the manifest absurdity of citing Labor Board cases in the present aspect of the anti-trust field. In that case the amount of commerce that occasioned exercise of the Board's jurisdiction was $2,300. Certainly not even the Government would contend that if the net result of this alleged conspiracy was to restrain $2,300 worth of plastering the conspiracy would be cognizable by the Sherman Act. *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469 (1940). We submit that the Government's use of Labor Board cases only heightens the total lack of precedent for the proposition that construction activities within a particular state constitutes or substantially affects trade or commerce within the Sherman Act. Cf. *United States* v. *Five Gambling Devices*, Nos. 14, 40 and 41, this Term, decided Dec. 7, 1953.

Conclusion.

We submit that because the complaint totally lacks allegations describing an effect either upon the price, quality, volume or marketing of plastering goods—the only interstate commerce in this case—the language of Mr. Justice Stone in his concurring opinion in *United States* v. *Hutcheson*, 312 U. S. 219, 240 (1941) is most pertinent:

> * * * Precisely as in *Levering & Garrigues Co.* v. *Morrin*, 289 U. S. 103, where a local building strike with like consequences was held not to violate the Sherman

law, there is wanting here any fact to show that the conspiracy was directed at the use of any particular building material in the states of origin and destination or its transportation between them 'with the design of narrowing or supressing the interstate market,' each of which were thought to be crucial in *Bedford Cut Stone Co.* v. *Stone Cutters' Assn.*, 274 U. S. 37, 46-47.

See also *United Leather Workers* v. *Herkert*, 265 U. S. 457 (1924) and the *Second Coronado* case, 268 U. S. 295, 310 (1925).

For the foregoing reasons we respectfully suggest that the judgment below dismissing the complaint must be affirmed.

Respectfully submitted,

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DON H. REUBEN,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 440

UNITED STATES OF AMERICA,
Appellant,

vs.

EMPLOYING PLASTERERS' ASSOCIATION OF CHICAGO, JOURNEYMEN PLASTERERS' PROTECTIVE AND BENEVOLENT SOCIETY, LOCAL NO. 5, O. P. & C. F. I. A., AND BYRON WILLIAM DALTON,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

BRIEF FOR THE APPELLEES, JOURNEYMEN PLASTERERS' PROTECTIVE AND BENEVOLENT SOCIETY, LOCAL NO. 5, O. P. & C. F. I. A., AND BYRON WILLIAM DALTON.

DANIEL D. CARMELL,
Attorney for Journeymen Plasterers' Protective and Benevolent Society, Local No. 5, O. P. & C. F. I. A., and Byron William Dalton, Appellees.

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OPINION BELOW.

The opinion of the court below (R. 17), the District Court for the Northern District of Illinois (Perry, *J.*) is unreported.

JURISDICTION.

The District Court on January 20, 1953, entered an order granting the appellees' motion to strike the appellant's complaint and dismiss the action (R. 20-21). Thereupon, on September 18, 1953, the appellant, invoking Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C., Section 29, as amended by Section 17 of the Act of July 25, 1948, 62 Stat. 869, procured an order of the District Court allowing an appeal to this Court (R. 21-22). This Court denied the appellees' motion to dismiss the appeal or affirm the conviction below and noted probable jurisdiction of the cause on November 30, 1953 (R. 24).

QUESTIONS PRESENTED.

The questions presented are:

1. The complaint did not state facts sufficient to constitute a cause of action against the defendants Local 6 and Byron Dalton.
2. The conduct involved is immunized from being a violation of the Sherman Act by the Clayton and Norris-LaGuardia Act.
3. The Complaint does not set forth sufficient allegations of fact to sustain a charge of conspiracy.
4. The Complaint on its face demonstrates that there has been no restraint of interstate commerce within the meaning of the Sherman Act.

The Government filed a Complaint in Chancery against Employing Plasterers Association of Chicago, an Illinois corporation, organized under the Illinois not-for-profit corporation laws, hereinafter referred to as the "Association," and Journeymen Plasterers Protective and Benevolent Society, Local No. 5, O. P. & C. F. I. A., an unincorporated Labor Union, with its place of business and offices in Chicago, consisting of 1200 Journeymen Plasterers and

Apprentices, hereinafter referred to as "Local," and Byron William Dalton, described as President of said Local, charging that they engaged in an unlawful combination and conspiracy to suppress competition among the Plasterer Contractors in the Chicago area and to exclude persons from engaging in the plastering contracting business in said area, in unreasonable restraint in trade and commerce among the several States and to monopolize the interstate commerce in the sale, distribution, and installation of plastering materials utilized in the Chicago area in violation of Sec. 1 of the Sherman Act (R. 1, *et seq.*).

The complaint prays for an injunction.

The complaint avers there are 140 plastering contractors in the Chicago area, doing a dollar volume business of $25,000,000. 39 of the 140 are members of the Association and they do a volume of business of $15,000,000.

The complaint avers that the plastering materials are mostly produced in other States and are purchased in interstate commerce by material dealers who, in turn, sell the material to the plastering contractors; that large quantities of the plastering materials are warehoused and sold by the dealers to the contractors and substantial quantities are caused to be delivered by the contractors directly to the job site.

The complaint avers that the Local has an Examining Board, who examined each plastering contractor except those who were in business at the inception of the conspiracy and refuses to allow its members to work for any contractor who is not approved by the Local; that none of the members of the Association perform plastering work for a general contractor who has an unresolved dispute with another plastering contractor; that out-of-State plastering contractors are excluded from engaging in the plas

tering contracting business in the Chicago area and that these agreements are enforced by strikes and slow-downs.

There is no averment that the purpose of the agreement is to restrain interstate commerce; there is no averment that as a result of the agreement there is any diminution or restriction of interstate commerce; and there is no averment that it has any effect upon the number of buildings constructed in the Chicago area or the amount of the material used therein. The only averment with reference to its effect upon interstate commerce is by way of conclusion of the pleader.

The motion to dismiss the complaint was filed by each of the defendants, because the complaint fails to state a claim against these defendants upon which any relief can be rendered (R. 10).

Upon a hearing, the Court sustained the motion to dismiss. The Government elected not to amend, and the suit was dismissed. The reason for the action of the Court (R. 13), was that the defendants were not engaged in interstate commerce and the contractors became possessed of the materials after it came to rest in Illinois and it ceased to be a component part of interstate commerce; that the defendant Local and Dalton were not engaged in interstate commerce; that the agreement was an intrastate agreement and there was no averment that it had any effect upon the market price of the material. There was no averment of any discrimination against anyone engaged in interstate commerce; there was no allegation of fact of its effect upon the flow of materials into the State of Illinois.

STATUTE INVOLVED.

The germane portions of Sections 1 and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended (15 U. S. C. 1 and 4), commonly known as the Sherman Act, are as follows:

> Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.
>
> Sec. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * *"

29 U. S. C. A. (Norris-La Guardia Act):

> Sec. 101. Issuance of restraining orders and injunction; limitation; public policy.
>
> No court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of such sections; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in such sections.
>
> Sec. 102. Public policy in labor matters declared.
>
> In the interpretation of this Act and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in such sections, the public policy of the United States is declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted.

Sec. 103. Nonenforceability of undertakings in conflict with public policy; "yellow dog" contracts.

Any undertaking or promise, such as is described in this section, or any other undertaking or promise in conflict with the public policy declared in section 102 of this title, is declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court, including specifically the follwing:

Every undertaking or promise hereafter made, whether written or oral, express or implied, constituting or contained in any contract or agreement of hiring or employment between any individual, firm, company, association, or corporation, and any employee or prospective employee of the same, whereby

(a) Either party to such contract or agreement undertakes or promises not to join, become, or remain a member of any labor organization or of any employer organization; or

(b) Either party to such contract or agreement undertakes or promises that he will withdraw from an employment relation in the event that he joins, becomes, or remains a member of any labor organization or of any employer organization.

Sec. 104. Enumeration of specific acts not subject to restraining orders or injunctions.

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this Act;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore

specified, regardless of any such undertaking or promise as is described in section 103 of this title.

Sec. 105. Doing in concert of certain acts as constituting unlawful combination or conspiracy subjecting person to injunctive remedies.

No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in section 104 of this title.

Sec. 106. Responsibility of officers and members of associations or their organizations for unlawful acts of individual officers, members, and agents.

No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

Sec. 107. Issuance of injunctions in labor disputes; hearing; findings of court; notice to affected persons; temporary restraining order; undertakings.

No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be

issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Sec. 108. Noncompliance with obligations involved in labor disputes or failure to settle by negotiation or arbitration as preventing injunctive relief.

No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

Sec. 109. Granting of restraining order or injunction as dependent on previous findings of fact; limitation on prohibitions included in restraining orders and injunctions.

No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific

act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided herein.

Sec. 113. Definitions of terms and words used in chapter.

When used in this Act, and for the purposes of such sections—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as defined in this section) of "persons participating or interested" therein (as defined in this section).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regard-

less of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia.

Sec. 115. Repeal of conflicting acts.

All acts and parts of acts in conflict with the provisions of this Act are hereby repealed.

STATEMENT.

With one exception, the Government's "statement" is substantially accurate.

At page 4 the Government states that "the complaint charged the defendants with conspiring to restrain interstate commerce in plastering materials shipped from outside the state of Illinois for installation in buildings in the Chicago area." This we deny. There is in terms no such allegation in the entire complaint. The very issue before the Court is whether the sum total of the allegations of the Complaint constitute such a charge.[1]

The Government does state, and it is alleged (Par. 17, R. 5), that any restraint upon the performance of plastering work in Chicago necessarily and directly restrains and affects the interstate flow of plastering materials, but again we say that this is a pure conclusion.

---

1. It is alleged that one of the effects of the conspiracy has been that the flow in interstate trade and commerce of plastering materials "has been unlawfully restrained." (Par. 29, R. 8.) But this, we say, is a pure conclusion that cannot aid the complaint if it is otherwise defective.

ARGUMENT.

There Is No Relationship Between U. S. v. Employing Lathers Association, No. 439 on this Docket, and this Case No. 440.

At the outset it should be made clear that there is no relationship between the case of *United States of America* v. *Employing Lathers Association,* No. 439, on this docket, and this case No. 440.

The two cases involve entirely different factual situations. The District Court had both cases pending before it at the same time and made its decision of the two cases jointly. The Government in its brief apparently for the sake of brevity adopts certain pages of its brief in No. 439 as applying from a citation point of view to this case. This situation has added to the difficulty of these defendants in adequately replying. The only actual similarity between the two cases is that in each case the charge is a conspiracy to violate the Sherman Act and in each case the defendants consist of a local union and an association of employers, but they are different local unions and different associations of employers. We regret the Government has thus confused the issues.

The Complaint Is Faulty in that It Fails to Aver the Particulars of the Offense Charged.

Ordinarily it is not sufficient to charge the offense in the words of the statute creating the offense unless the words themselves fully, directly and expressly, without uncertainty or ambiguity, set forth all of the essential elements in order to constitute the crime.

U. S. v. *Britton,* 107 U. S. 655, 27 L. Ed. 520.
U. S. v. *Carl,* 105 U. S. 611, 26 L. Ed. 1135.

Where the statute is general in terms and fails fully directly and expressly to set forth with certainty and without ambiguity all of the elements necessary to constitute the offense, the pleading must descend to particulars and charge every constituent ingredient of which the crime was composed.

U. S. v. *Cruikshank*, 92 U. S. 542, 23 L. Ed. 588.
U. S. v. *Hess*, 124 U. S. 483, 31 L. Ed. 562.

The Sherman Act "has a generality and adaptability comparable to that found to be desirable in constitutional provisions."

Appalachian Coals, Inc. v. *U. S.*, 288 U. S. 344, 77 L. Ed. 825.

The complaint in this case fails to measure up to these requirements. Paragraph 19 of the complaint entitled "Combinations and Conspiracy" merely avers that beginning in or about 1938 and continuing to date, the defendants and their co-conspirators and others unknown, have engaged in an unlawful combination and conspiracy to suppress competition among plastering contractors in the Chicago area and to restrict and exclude persons from engaging in the contracting business in such area in unreasonable restraint of trade and commerce among several states and to monopolize the interstate commerce as hereinbefore described in the sale and distribution of plastering materials utilized in the Chicago area in the performance of plastering contract work in violation of Sections 1 and 2 of the Sherman Act. This charge, if it amounts to a charge of violation of the Sherman Act, which is doubtful because it charges things not condemned by the Sherman Act, is so indefinite as to require the pleader to descend to particulars and allege the ingredients of which the offense is composed. There is no charge of any at-

tempt to restrict shipments, to restrict buildings, or to restrict and curtail the use of plastering materials.

The particularization required by law is attempted in paragraph 20 and in subsequent paragraphs in the complaint. It is there alleged Local 5 has maintained in force rules requiring anyone who desires to be a plastering contractor to take an examination by a board of examiners composed exclusively of the Board members of the Local Union. It is averred that this rule is enforced by a refusal of the members of the Local to work for any contractor who has not passed the examination. No agreement between the Association and the Union with respect to this is averred. There is no averment as to any details of the examination; there is no averment that any specific person was ever denied Union labor because he failed to pass the examination; there is no averment that there was any discrimination in the application of the rule. It may well be inferred that the examination is for the purpose of ascertaining the financial stability of the contractor and of assuring the payment of the wages earned by the members of the Union; that the agreement is for the purpose of determining whether or not the contractor has the skill and knowledge to enable him properly to mix the various ingredients that go into the plastering job. No inference of impropriety or wrongdoing can be drawn from the averment. There is no impropriety in the wage earner selecting his employer with the same discrimination that the employer selects his employee.

It is averred that no plastering contractor in the Chicago area is permitted to alter the membership or management of his firm or organize the corporation without first securing the approval of the Local. How this can in any way affect interstate commerce is not evident. Altering the financial structure of the contractor's business might

have serious repercussions upon his financial stability. The purpose of such a rule apparently is to assure the employee of a financially sound employer. The advantage of such precaution is graphically shown by a list of industrial and commercial failures in the appendix hereto.

It is averred that for many years last past "the defendant Association and Local 5 have incorporated into a joint agreement a so-called "original contractor" rule. Under the rule, plastering contractors in the Chicago area, including the members of the Association, are required to boycott and refuse to enter into plastering contracts with any general contractor on any plastering job on which another plastering contractor has started work or has received a contract, except with the consent of the original contractor. This cannot have the remotest effect upon interstate commerce. It is important, however, to observe the language of the averment to the effect that for many years the Association and the Local have incorporated into a joint agreement. This joint agreement apparently means a wage agreement, a contract concerning the terms and conditions of employment. It alleges that when a general contractor tried to escape the original contractor rule by contracting with out-of-state union contractors to do work in the Chicago area, the defendants have harassed and intimidated such out-of-state contractors in order to assure adherence to the rule.

To reach the point of any effect of the alleged conspiracy, the complaint does not even charge that any out-of-state plastering contractor ever came in to Chicago area to bid a plastering contract, and further that if they did accept such a contract that the union did any thing or require them to enter into a collective bargaining agreement on any or different terms than Chicago plastering contractors.

The complaint affirmatively shows these things did *not* take place, for it charges "* * * Defendants have been so successful in excluding out-of-state plastering contractors from the Chicago area by use of tactics such as those described above that no out-of-state plastering contractors have undertaken to perform plastering contracts in the Chicago area for nearly *twenty years,* except for one veterans hospital, one Federal housing project, and one state hospital" (Pa. 28, R. 7, 8). (Emphasis supplied.)

The alleged conspiracy is charged as having begun "in or about 1938" (Par. 19, R. 5).

Thus, on the face of the pleading which was filed in 1952, it appears that for *six* years prior to the alleged conspiracy no out-of-state contractor came into Chicago or if they did they were subject to the same conditions insofar as the union acting alone was concerned as they were after 1938, for it is charged that because of the "tactics" used no out-of-state plastering contractors have "*undertaken*" to perform plastering contracts. Therefore, if for 20 years prior to the filing of the complaint herein no out-of-state contractor undertook to perform any contract in the Chicago area which was 6 years before the alleged conspiracy and the same reasons compelled them to stay out of the Chicago area when the Union was acting alone, in what manner could alleged conspiracy have kept them out if the Union acting alone did only that which it did before 1938? Further, after 1938, three huge projects were performed by out-of-state contracts and there is no charge that any of the "tactics" were used against them as a result of the alleged conspiracy.

The pleading on its face negatives any inference of wrong doing or illegality insofar as the Sherman Act is concerned.

In the case of the *U. S. Bay Painters & Decorators Joint*

Committee, Inc., et al., 49 Fed. S. 734, the Court dealt with the factual situation remarkably parallel to the situation presented by the complaint in this case. There the indictment alleged that the conspiracy has consisted of a continuing agreement and concert of action among the defendants, the substantial terms of which have been:

> "(a) Defendant employers and defendant Unions have agreed to restrict the use of painting by spray equipment, by oral and written agreements which have been renewed from year to year, within the period of this indictment pursuant to and in furtherance of this conspiracy. The rest of the charges relate to enforcement of the agreement by refusal to furnish labor, the levying of fines, etc."
>
> "The indictment further alleged that the things done and the acts performed in furtherance of the conspiracy had the necessary direct effect of substantially affecting, restraining and diminishing interstate commerce in spray equipment, paints and painting materials."

The indictment contained one averment not found in the instant case.

> "The things done and the act performed incident to and in furtherance of the conspiracy were intended by the defendants to affect and restrain and diminish interstate commerce in spray equipment, paints and painting materials."

The Court said (p. 735):

> "It is obvious that these allegations are mere legal conclusions. There is no allegation of any actual or direct prevention of the manufacture or sale of the spray equipment or of its shipment into the State. There is no allegation that the defendants intended to fix prices or suppress competition."
>
> "It was said in *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 60 S. Ct. 982, 84 L. Ed. 1311, that 'restraints on competition or on the course of trade in the mer-

> chandising of articles moving in interstate commerce' do not violate the Sherman law 'unless the restraint is shown to have or is intended to have an effect upon prices in the market or otherwise to deprive purchasers or consumers of the advantage which they derive from free competition. The restraint here has not been shown to have any actual or intended effect upon price or price competition. In *Appalachian Coal* v. *U. S.*, 288, U. S. 344, 53 S. Ct. 471, 77 L. Ed. 825. The Court quotes with approval the following language: 'Only such contracts are within the act as by reason of intent or the inherent nature of the contemplated acts, prejudice to public interests by unduly restricting competition or unduly obstruct the course of trade'."

The Court held the indictment bad.

In the case at bar, there is no averment of any intended effect upon interstate commerce; there is no averment that the flow of commerce in plastering materials was restricted in the slightest; there is no averment of any restriction in the construction of buildings; there is no averment of any increase in cost of the materials; the pleader relies entirely upon his conclusion that commerce was restrained.

If there was any effect upon interstate commerce in plastering materials, it was incidental and remote. It spent its efforts upon the local situation. "Activities local in their immediacy do not become interstate and national because of distant repercussions." *A. L. A. Schecter Poultry Corporation* v. *U. S.*, 295 U. S. 495, 534, 70 L. Ed. 1570.

In the instant case, the alleged unlawful acts of the defendants spent their intended and directed efforts on a local situation that building is as essentially local as mining, manufacturing, or growing crops, and if by resulting diminution of the commercial demand, interstate trade was curtailed generally or in specific instances, that was a fortuitous consequence so remote and indirect. *Industrial As-*

sociation v. *U. S.*, 263 U. S. 64, 82; 69 L. Ed. 849, 855. The alleged acts fall outside the orbit of the Sherman Act.

The Defendant Local 5 and Dalton Were Not Engaged in Interstate Commerce.

The Complaint avers the plastering materials were purchased from out-of-state sources by material dealers. The material dealers were located in the Chicago area. They, in turn, by a local transaction, sold the plastering materials to plastering contractors. The plastering contractors engaged to apply the materials to the walls and ceilings of buildings being constructed in the form of plaster. This involved a sale to the general contractor of the plastering materials and the labor it took to apply them. The members of defendant Local never became possessed of the plastering materials. They only contributed their labor in applying the materials in a mixed condition to the walls and ceilings of buildings being constructed. They were merely employed as laborers on a local project by a local contractor to apply a mixture of local products with plastering materials which had in the past been an item of interstate commerce but which had come to rest within the state of Illinois, and had been the subject of two (2) local sales. After the application of their labor the products became real property and nothing can be more local than real property. They had absolutely no connection with the interstate aspects of the material. It is doubtful if they even knew the origin of the materials. Any transaction, therefore, between them and the defendant Association dealt only with the application of their labor to products purchased by the plastering contractor from a local dealer. It is not averred that either the members of Local 5, the defendant Dalton or the Association had any purpose in mind to restrict or restrain interstate commerce

or the use of plastering materials or in any way to curtail the number of buildings being constructed. Indeed, it would appear that their interest lay in exactly the opposite direction. The members of the Association were in the business of contracting for the installation of plastering. The members of the union were in the business of selling their labor in the installation of plastering. Any restriction in the shipment or use of plastering materials would work to their disadvantage. Therefore, the common sense of the situation negatives the implication the government would draw from the facts averred.

Therefore, we are dealing with a contract between local people engaged in local trade. Any effect their agreements may have had upon interstate commerce was of necessity indirect, incidental and inconsequential. Under the authorities heretofore cited, this does not bring their relationship within the condemnation of the Sherman Act, and the courts of the United States are without jurisdiction.

No Case Is Stated Against the Defendant Dalton.

There is a complete absence of any averments affecting the defendant Dalton. He is described in the introduction portion of the complaint (R. 2) as being the President of Local 5 and was business agent of such local for many years prior to becoming president. No mention is made of his connection with the alleged conspiracy. Indeed, his name is mentioned only twice (R. 6) and that is by way of conclusion.

The charge of conspiracy must be specific enough (a) that the defendants may be apprised of the charge they have to meet and be able to prepare their defense; (b) so that the defendants can plead former jeopardy; and (c) so that the court can tell whether the facts

alleged if proved will constitute an offense. *U. S.* v. *Cruikshank,* 92 U. S. 542, 23 Lawyers Edition, 588.

It is apparent that the charge is insufficient. As was said in *U. S.* v. *French Bauer,* 48 F. Supp. 261:

> "When the Government invokes jurisdiction of the court to determine whether a particular conspiracy or particular acts alleged to constitute a conspiracy are reached by the Sherman Act I think it clear that facts must be alleged, which, if established by proof, would bring the acts complained of within the scope or reach of the Sherman Act."

It has been demonstrated that the complaint fails to state a cause of action. In the case of *Levering & Garrigues Co.* v. *Morrin,* 289 U. S. 102, 77 Lawyers Edition, 1062, this court used the following language:

> "Whether an objection that a bill or a complaint fails to state a case under a federal statute raises a question of jurisdiction or of merits is to be determined by the application of a well settled rule. If the bill or the complaint sets forth a substantial claim, a case is presented within the federal jurisdiction, however the court, upon consideration, may decide as to the legal sufficiency of the facts alleged to support the claim. But jurisdiction, as distinguished from merits, is wanting where the claim set forth in the pleading is plainly unsubstantial."

Under the Facts Alleged These Defendants Are Immunized Under the Clayton Act and the Norris-La Guardia Act.

The complaint avers Local 5 to be a labor union; the defendant Dalton to be President of the labor union; the members of the Association to be employers of members of the union. The complaint likewise refers (R. 7, Par. 25) to a joint agreement between Local 5 and the Association. A joint agreement used with reference to employer-em-

ployee relationship has a well understood meaning. It means an agreement respecting the terms and conditions of employment.

No decision prior to *Apex Hosiery* v. *Leader,* 310 U. S. 469 (1940) and *United States* v. *Hutcheson,* 312 U. S. 235, has any application because in both of these cases the Supreme Court of the United States has determined that Congress intended and did exempt from the operation of the Sherman Anti-Trust Act labor unions pursuant to the provisions of Section 20 of the Clayton Act and the later Norris-La Guardia Act. As was stated in *U. S.* v. *Hutcheson,* 312 U. S. 235, and 236:

> "There is no profit in discussing those cases under the Clayton Act which were decided before the courts were furnished the light shed by Norris-LaGuardia Act on the nature of the industrial conflict. And since the facts in the indictment are made lawful by the Clayton Act insofar as 'any law of the United States' is concerned, it would be idle to consider the Sherman Law apart from the Clayton Act as interpreted by Congress * * *. It was precisely in order to minimize the difficulties which the general language of the Sherman Law in its application to workers had given rise, that Congress cut through all tangled verbalisms and enumerated concretely the types of activities which had become familiar incidents of union procedure."
> P. 229: "On the other hand the statute may validly satisfy the statute under which the pleader proceeded, but on the other, statutes not referred to by him may draw the sting of criminality from the allegations."
> P. 232: "Were then the acts charged against the defendant prohibited or permitted by these three interlacing statutes? If the facts laid in the indictment came within the conduct enumerated in Section 20 of the Clayton Act they do not constitute a crime within the general terms of the Sherman Law because of the explicit command of that section that such conduct shall not be 'considered or held to be violations of any law of the United States.' "

As stated by the Supreme Court of the United States, any act which is lawful under any law of the United States cannot be considered a violation of the Sherman Law.

As stated in the *Hutcheson* case (page 234), Mr. Justice Frankfurter said:

> "It would be strange indeed that although neither the Government nor Anheuser-Busch could have sought an injunction against the acts here challenged, the elaborate efforts to permit such conduct failed to prevent criminal liability punishable with imprisonment or heavy fines. This is not the way to read the will of Congress particularly when expressed by a statute which as we have already indicated is practically and historically one of a series of enactments touching one of the most sensitive national problems. Such legislation must not be read in a spirit of mutilating narrowness."

On page 236 the court specifically said:

> "The Norris-LaGuardia Act asserted the original purpose of the Clayton Act by infusing into it the immunized trade union activities as redefined by the later Act. In this light Section 20 removes all allowable conduct from the taint of being a 'violation' of any law of the United States, including the Sherman Law."

Again, in the *Hutcheson* case, as said on page 231:

> "* * * whether trade union conduct constitutes a violation of the Sherman Law is to be determined only by reading the Sherman Law and Section 20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of outlawry of labor conduct."

To the same effect is *Apex Hosiery* v. *Leader*, 310 U. S. 469. Thus, it is necessary for the complaint to aver that the activities complained of were not legal under the terms of the Clayton Act and the Norris-LaGuardia Act. It was

held by the District Court in the case of *U. S.* v. *Carrozzo,* 37 Fed. Supp. 191, at 195:

> "It must clearly appear from the indictment that the activities with which defendants are charged are such as unreasonably restrain interstate commerce and prejudice the public interests, and are not activities which come within the normal, legitimate and lawful activities which may be employed by a labor union, and which, under Sections 6 and 20 of the Clayton Act, and the Norris-LaGuardia Act, are exempt from prosecution under the Sherman Act."

To the same effect is *U. S.* v. *American Federation of Musicians,* 47 Fed. Supp. 304, affirmed by memorandum, 318 U. S. 741, 87 L. Ed. 1120, and the *U. S.* v. *Bay Area Painters and Decorators Joint Com.,* 49 Fed. Supp. 733.

Complaint Must Specifically and Unequivocally Charge a Violation of the Sherman Act Where Labor Unions Are Involved.

Section 101, of the Norris-LaGuardia Act, specifically prohibits courts of the United States from issuing any restraining order in a case involving or growing out of a labor dispute *"except in a strict conformity with the provisions of such sections."*

Section 105 of the Norris-LaGuardia Act provides in effect that no injunction shall issue upon the "ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in section 104 of this title."

Immunized acts which are enumerated in Section 104 are "(a) Ceasing or refusing to perform any work or to remain in any relation of employment;" or "(g) Advising or notifying any person of an intention to do any of the

acts heretofore specified; (h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and (i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, * * *".

Section 106 provides that no officer or member of any association or organization participating or interested in a labor dispute shall be held liable in any court of the United States for the unlawful acts of individual officers, members or agents, "except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof."

Section 113 of the Norris-LaGuardia Act declares that a case shall be held to involve or grow out of a labor dispute when it involves persons who are in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees. It makes no difference under this definition as to whether it is an employer association or an association of employees, because the definition states that it makes no difference whether the dispute is between one or more employers or association of employers and one or more employees or association of employees, when the case involves any conflicting or competing interest in a labor dispute of persons participating or interested therein.

As stated in *United Brotherhood* v. *United States,* 330 U. S. 395, 401, 91 L. Ed. 973, 981, where the indictment alleged that the purpose and effect of the conspiracy was to restrain out of state manufacturers from shipping and selling commodities within the San Francisco Bay Area in California. The court there said "it properly is conceded that this agreement grew out of such a labor dispute

and that all parties defendant participated or were interested in that dispute."

Therefore, the alleged conduct stated in the complaint being a labor dispute and that no injunction can be issued unless "in strict conformity with the provisions" of the Norris-LaGuardia Act (Section 101) and that the responsibility of officers and members of associations for any alleged unlawful act of individual officers cannot be had except upon clear proof of actual participation therein or ratification after actual knowledge (Section 106). It, therefore, becomes incumbent upon the government to not only specifically plead and aver facts which will show that this is not a labor dispute, and, therefore, exempt from the operation of the Sherman Act, but also must allege and aver that the union and the officers had actual knowledge of the alleged illegality or that the union after knowledge ratified acts.

These allegations are missing from the complaint and, therefore, do not state a cause of action against Local 5 and Byron Dalton.

Section 104 specifically immunizes the right to cease or refuse to perform any work or to remain in any relations of employment or advising or notifying any person of intention to do any of the acts specified or agreeing to do or not to do any of the acts specified in Section 104. Therefore, the allegation that the union has not furnished men for out of state contractors is legal and immunized conduct under the Norris-LaGuardia Act.

A complaint seeking an injunction in a labor dispute must, as a pre-requisite, comply with all the requirements of the Norris-LaGuardia Act. *Brotherhood of Railroad Trainmen* v. *Toledo, etc.*, 321 U. S. 50 64 S. C. T. 413.

Section 8 of the LaGuardia Act (29 U. S. C. A. Section 108) denies injunctive relief "to any complainant" who has failed to comply with any obligation imposed by law.

As has been pointed out by the Court in *United Brotherhood* v. *U. S. supra,* even in a criminal case brought by the United States that the Norris-LaGuardia Act applies to a labor dispute.

If they choose the injunctive remedy in a labor dispute, they must be in complete compliance with the provisions of the Norris-LaGuardia Act.

This emphasizes the requirement of the government in this case, when seeking an injunction in a labor dispute involving or growing out of a labor dispute. Its duty to specify and particularize the averments in the complaint, not in general language or legal conclusion as contained in this bill of complaint, but in a detailed and specific manner.

This Court in *Brotherhood Railroad Trainmen* v. *Toledo, P. & W. R. Co.,* 321 U. S. at page 63—88 Lawyers Ed. on page 542 said:

> "Nor does it follow, as respondent seems to imply, that it is left without remedy. Other means of protection remain. Suits for recovery of damages still may be brought in the federal courts, when federal jurisdiction is shown to exist. Federal statutes supply criminal sanctions, enforceable in the federal courts, against persons who interfere in specified ways with the operation of interstate trains or destroy the property of interstate railroads. Cf. 18 U. S. C. A.—412a, 7 F. C. A. title 18,—412a. With these and other remedies that may be available we are concerned no further than to point out that respondent's failure to observe the requirements of sec. 8 has not left it without legal protection. That failure has deprived it merely of one form of remedy which the Congress, exercising its plenary control over the jurisdiction of the federal courts, has seen fit to withhold. With the wisdom of that action we have no concern. It is enough, for its enforcement, that it is written plain and does not transcend the limits of the legislative power. Cf. *Lauf* v. *E. G. Shinner & Co.* 303 U. S. 323, 82 L. Ed. 872, 58 S. Ct. 578."

Conclusion.

The lower court should be sustained for the reason that the complaint is completely insufficient in its averments. It depends upon conclusion and omits averments of fact.

There are no averments that the alleged actions of the defendants in any way directly affect interstate commerce, have any bearing upon the normal flow thereof or upon the price of the plastering materials therein.

That no monopoly is averred or proved and the facts averred negative the possibility of the existence of a monopoly.

That it appears from the averments in the complaint that the agreements between the Association and Local 5 were made with respect to terms and conditions of employment and were not intended to and did not as a matter of fact affect interstate commerce.

That under the facts averred the provisions of the Clayton Act and the Norris-LaGuardia Act remove the Local from the condemnation of the Sherman Act.

Respectfully submitted,

DANIEL D. CARMELL,
Attorney for Journeymen Plasterers' Protective and Benevolent Society, Local No. 5, O. P. & C. F. I. A., and Byron William Dalton, Appellees.

APPENDIX.

Industrial and Commercial Failures, 1952

Construction	Failures	Liabilities
January, 1952	68	$2,672,000
February	70	1,935,000
March	72	2,485,000
April	93	3,853,000
May	75	2,646,000
June	78	2,990,000
July	48	3,196,000
August	58	1,816,000
September	50	2,729,000
October	88	5,167,000
November	62	1,588,000
December	76	5,068,000
Monthly Average (1952)	70	3,012,000

Source: Business Statistics, 1953 Biennial edition. Gov't Printing Office, 1953, page 24. (Compiled by U. S. Dep't of Commerce, office of Business Economics).
"A failure is defined as a concern that is involved in a court proceeding or a voluntary action that is likely to end in loss to creditors."
(Credit is given by Gov't to Dun & Bradstreet for above figures.)

Industrial and Commercial Failures, 1953.

Construction Industry	Failures	Liabilities
January, 1953	78	$2,735,000
February	86	3,378,000
March	85	3,506,000
April	86	3,748,000
May	70	2,511,000
June	99	3,200,000
July	64	2,789,000
August	92	3,868,000
September	89	4,451,000
October	89	4,366,000

Source: Survey of Current Business, Dec. 1953, page 5-4. U. S. Dep't of Commerce, Office of Business Economics. (Figures are credited to Dun & Bradstreet.)

UNITED STATES *v.* EMPLOYING PLASTERERS ASSOCIATION OF CHICAGO ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 440. Argued February 3, 1954.—Decided March 8, 1954.

The United States brought a civil action in a Federal District Court charging a violation of § 1 of the Sherman Act by a Chicago trade association of plastering contractors, a local labor union of plasterers, and the union's president. The complaint alleged a combination and conspiracy to restrain competition among Chicago plastering contractors, and charged that the effect was to restrain interstate commerce. *Held:* The complaint stated a cause of action on which relief could be granted on proper proof. Pp. 187–190.

(a) The contention that the Sherman Act was inapplicable here because the interstate buying, selling and movement of plastering materials had ended before the local restraints became effective, cannot be sustained. P. 189.

(b) Wholly local business restraints can produce effects condemned by the Sherman Act. P. 189.

(c) Where a complaint filed by the Government under the Sherman Act charges every element necessary to relief, a defendant who desires more evidential facts may call for them under Rule 12 (e) of the Federal Rules of Civil Procedure; and if the Government's claim is frivolous, a full-dress trial can be avoided by invoking the summary judgment procedure under Rule 56. P. 189.

(d) Section 20 of the Clayton Act does not render a labor union immune from prosecution for violation of the Sherman Act upon a charge that the union and its president have combined with business contractors to suppress competition among them. P. 190.

118 F. Supp. 387, reversed.

Charles H. Weston argued the cause for the United States. With him on the brief were *Acting Solicitor General Stern, Assistant Attorney General Barnes* and *Marvin E. Frankel.*

Thomas M. Thomas argued the cause for the Employing Plasterers Association of Chicago, appellee. With

him on the brief was *Howard Ellis*. *Perry S. Patterson* entered an appearance.

Daniel D. Carmell argued the cause and filed a brief for the Journeymen Plasterers' Protective and Benevolent Society, Local No. 5, et al., appellees.

MR. JUSTICE BLACK delivered the opinion of the Court.

The United States brought this civil action in a Federal District Court charging the defendants (appellees here) with having violated § 1 of the Sherman Act which forbids combinations or conspiracies in restraint of interstate trade or commerce.* Holding that the complaint failed to state a cause of action on which relief could be granted under the Act, the District Court dismissed. The case is before us on direct appeal, 15 U. S. C. § 29, and the only question we must decide is whether the District Court's dismissal was error. We hold it was.

In summary the Government's complaint alleges:

> Defendants are (1) a Chicago trade association of plastering contractors; (2) a local labor union of plasterers and their apprentices; (3) the union's president. These contractors and union members employed by them do approximately 60% of the plastering contracting business in the Chicago area of Illinois. Materials used in the plastering, such as gypsum, lath, cement, lime, etc., are furnished by the contractors. Substantial quantities of this material are produced in other states, bought by Illinois build-

*26 Stat. 209, as amended by 50 Stat. 693, 15 U. S. C. § 1, so far as here relevant reads:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ." The complaint here also charged a violation of § 2 of the Sherman Act, but the Government has not pressed that claim here. Cf. *Standard Oil Co.* v. *United States*, 337 U. S. 293, 314.

ing materials dealers and shipped into Illinois, sometimes going directly to the place of business of the dealers and sometimes directly to job sites for use by the plastering contractors under arrangements with the dealers. The practical effect of all this is a continuous and almost uninterrupted flow of plastering materials from out-of-state origins to Illinois job sites for use there by plastering contractors. Restraint or disruption of plastering work in the Chicago area thus necessarily affects this interstate flow of plastering materials adversely. Since 1938 the Chicago defendants have acted in concert to suppress competition among local plastering contractors, to prevent out-of-state contractors from doing any business in the Chicago area and to bar entry of new local contractors without approval by a private examining board set up by the union. The effect of all this has been an unlawful and unreasonable restraint of the flow in interstate commerce of materials used in the Chicago plastering industry.

The District Court did not question that the foregoing and other factual allegations showed a combination to restrain competition among Chicago plastering contractors. But the court considered these allegations to be "wholly a charge of local restraint and monopoly," not reached by the Sherman Act. And the court held that there was no allegation of fact which showed that these powerful local restraints had a sufficiently adverse effect on the flow of plastering materials into Illinois. At this point we disagree. The complaint plainly charged several times that the effect of all these local restraints was to restrain interstate commerce. Whether these charges be called "allegations of fact" or "mere conclusions of the pleader," we hold that they must be taken into account in deciding whether the Government is entitled to have its case tried.

We are not impressed by the argument that the Sherman Act could not possibly apply here because the interstate buying, selling and movement of plastering materials had ended before the local restraints became effective. Where interstate commerce ends and local commerce begins is not always easy to decide and is not decisive in Sherman Act cases. See *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219, 232. However this may be, the complaint alleged that continuously since 1938 a local group of people were to a large extent able to dictate who could and who could not buy plastering materials that had to reach Illinois through interstate trade if they reached there at all. Under such circumstances it goes too far to say that the Government could not possibly produce enough evidence to show that these local restraints caused unreasonable burdens on the free and uninterrupted flow of plastering materials into Illinois. That wholly local business restraints can produce the effects condemned by the Sherman Act is no longer open to question. See, *e. g.*, *United States* v. *Women's Sportswear Manufacturers Assn.*, 336 U. S. 460, 464.

The Government's complaint may be too long and too detailed in view of the modern practice looking to simplicity and reasonable brevity in pleading. It does not charge too little. It includes every essential to show a violation of the Sherman Act. And where a bona fide complaint is filed that charges every element necessary to recover, summary dismissal of a civil case for failure to set out evidential facts can seldom be justified. If a party needs more facts, it has a right to call for them under Rule 12 (e) of the Federal Rules of Civil Procedure. And any time a claim is frivolous an expensive full dress trial can be avoided by invoking the summary judgment procedure under Rule 56.

We hold it was error to dismiss the Government's complaint for failure to state a cause of action.

This leaves the separate contention of the union that it is immune from prosecution for violation of the Sherman Act because of § 20 of the Clayton Act. This contention has no merit under the allegations of the complaint here because they show, if true, that the union and its president have combined with business contractors to suppress competition among them. *Allen Bradley Co.* v. *Local Union No. 3*, 325 U. S. 797.

Reversed.

MR. JUSTICE MINTON, with whom MR. JUSTICE DOUGLAS joins, dissenting.*

That, accepting the pleadings as true, there are and were conspiracies to restrain is not open to question. The question is whether the Sherman Act applies, and that depends upon whether the conspiracies are to restrain interstate commerce. In my opinion, the activities here complained of are wholly intrastate, and the restraint upon interstate commerce, if any, is so indirect, remote and inconsequential as to be without effect and wholly foreign to an intent or purpose to conspire to restrain interstate commerce.

There is no interference with interstate commerce. That commerce ends when the plaster and lath reach the building site, whether they come first to material suppliers and at rest in their warehouses and afterwards on order delivered to the contractors on the job, as most of the transactions are alleged to be handled, or are delivered directly to the job. The construction of a building and the incorporation therein of plaster and lath are purely local transactions.

> "Nor is building commerce; and the fact that the materials to be used are shipped in from other states

*[This opinion applies also to No. 439, *United States* v. *Employing Lathers Assn. et al.*, *post*, p. 198.]

> does not make building a part of such interstate commerce." *Anderson* v. *Shipowners Assn.*, 272 U. S. 359, 364.

The Government does not and could not contend that building is commerce. It contends that the appellees' acts affect commerce, relying upon such cases as *Labor Board* v. *Denver Building Council*, 341 U. S. 675, and *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564. But those cases arose under different statutes, the sweep of which is broader than that of § 1 of the Sherman Act, which declares illegal only those contracts, combinations and conspiracies "in restraint of trade or commerce among the several States." The *Denver Council* case arose under the Labor Management Relations Act, which provides:

> "SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. . . ." 61 Stat. 146, 29 U. S. C. § 160 (a).

Section 2 of that Act defines "affecting commerce" as follows:

> "(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." 61 Stat. 138, 29 U. S. C. § 152 (7).

The *Jacksonville Paper* case arose under the Fair Labor Standards Act, which is applicable to "employees who [are] engaged in commerce or in the production of goods for commerce . . . ." 52 Stat. 1062, 29 U. S. C. § 206. Furthermore, that case dealt with transactions that took place in the stream of commerce. Compare *Higgins* v.

Carr Bros. Co., 317 U. S. 572. In the instant cases, the stream of commerce stops at the building site.

Insofar as the factual allegations in these complaints are concerned, the appellees are essentially charged with conspiring to divide the plastering and lathing business in the Chicago area among themselves, limiting the number and classes of persons who may become contractors or union members and reducing competition among the contractors, primarily by means of union control over those who may engage in the business either as contractors or as union members. The acts of the appellees here complained of thus are all related to local building construction and those permitted to engage in such construction. The allegations do not establish any interference with the flow of commerce, at its beginning or end or in the course of its flow, or that anything is done to influence the place from whence or to which the materials come or go, or their price. To be sure, the complaints contain bald statements to the effect that the alleged conspiracies are in restraint of interstate commerce. However, these conclusional allegations add nothing and do not conceal the failure to set forth facts showing any direct or substantial restraint on interstate commerce or a purpose or intent to do so. What is charged in these cases may constitute a restraint under state jurisdiction and may remotely or indirectly affect interstate commerce. But that has been consistently held to be no violation of the Sherman Act. *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 495; *Levering & Garrigues Co.* v. *Morrin*, 289 U. S. 103, 107.

Industrial Association of San Francisco v. *United States*, 268 U. S. 64, was a case involving far more offensive action than the instant cases. In that case, contractors and suppliers, in order to force an "open shop," required builders to secure permits for certain materials

from a builders' exchange, refusing such permits to those who did not maintain an open shop. Some of the materials came from other States, and the permits were so handled as to control materials, such as plumbers' supplies, that came altogether from out-of-state sources. This Court, commenting on the "established general facts" of the plan, said:

> "Interference with interstate trade was neither desired nor intended. On the contrary, the desire and intention was to avoid any such interference, and, to this end, the selection of materials subject to the permit system was substantially confined to California productions. The thing aimed at and sought to be attained was not restraint of the interstate sale or shipment of commodities, but was a purely local matter, namely, regulation of building operations within a limited local area, so as to prevent their domination by the labor unions. Interstate commerce, indeed commerce of any description, was not the object of attack, 'for the sake of which the several specific acts and courses of conduct were done and adopted.' *Swift and Company* v. *United States*, 196 U. S. 375, 397. The facts and circumstances which led to and accompanied the creation of the combination and the concert of action complained of, which we have briefly set forth, apart from other and more direct evidence, are 'ample to supply a full local motive for the conspiracy.' *United Mine Workers* v. *Coronado Co.*, 259 U. S. 344, 411." 268 U. S., at 77.

In language prophetic, this Court further said:

> "But here, the delivery of the plaster to the local representative or dealer was the closing incident of the interstate movement and ended the authority

of the federal government under the commerce clause of the Constitution. What next was done with it, was the result of new and independent arrangements." 268 U. S., at 79.

Although the permits were used so as to interfere with the free movement of materials and supplies from other States, this Court said:

"It was, however, an interference not within the design of the appellants, but purely incidental to the accomplishment of a different purpose. The court below laid especial stress upon the point that plumbers' supplies, which for the most part were manufactured outside the state, though not included under the permit system, were prevented from entering the state by the process of refusing a permit to purchase other materials, which were under the system, to anyone who employed a plumber who was not observing the 'American plan.' This is to say, in effect, that the building contractor, being unable to purchase the permit materials, and consequently unable to go on with the job, would have no need for plumbing supplies, with the result that the trade in them, to that extent, would be diminished. But this ignores the all important fact that there was no interference with the freedom of the outside manufacturer to sell and ship or of the local contractor to buy. The process went no further than to take away the latter's opportunity to use, and, therefore, his incentive to purchase. . . ."

. . . . .

"The alleged conspiracy and the acts here complained of, spent their intended and direct force upon a local situation,—for building is as essentially local as mining, manufacturing or growing crops,—and if, by

> a resulting diminution of the commercial demand, interstate trade was curtailed either generally or in specific instances, that was a fortuitous consequence so remote and indirect as plainly to cause it to fall outside the reach of the Sherman Act." 268 U. S., at 80, 82.

As I see it, that is all that happens here. Interstate commerce has ended. There is no intent or purpose to restrain interstate commerce. The effect upon commerce is incidental, remote and indirect. It is a restraint that spends itself on a purely local incident. If contractors of materials and supplies may combine to compel an open shop by far more drastic measures, as in the *Industrial Association* case, then surely the workers and contractors may combine to promote a closed system by an agreement local in its nature.

The case of *Levering & Garrigues Co.* v. *Morrin*, 289 U. S. 103, which followed the *Industrial Association* case, is in point here. In that case, the companies, engaged in the building of steel bridges, operated open shops. The unions by strike and other techniques sought to force closed shops. The companies sought an injunction under the Sherman Act. The complaint was dismissed for failure to state a cause of action. This Court said:

> "Accepting the allegations of the bill at their full value, it results that the sole aim of the conspiracy was to halt or suppress local building operations as a means of compelling the employment of union labor, not for the purpose of affecting the sale or transit of materials in interstate commerce. *Use* of the materials was purely a local matter, and the suppression thereof the result of the pursuit of a purely local aim. Restraint of interstate commerce was not an object of the conspiracy. Prevention of

> the local use was in no sense a means adopted to effect such a restraint. It is this exclusively local aim, and not the fortuitous and incidental effect upon interstate commerce, which gives character to the conspiracy. . . . If thereby the shipment of steel in interstate commerce was curtailed, that result was incidental, indirect and remote, and, therefore, not within the anti-trust acts, as this court, prior to the filing of the present bill, had already held. . . ." 268 U. S., at 107.

If a union may strike and obtain its objective of a closed shop without interfering with interstate commerce, as in the *Levering* case, the unions in the instant cases could certainly bargain and agree with the employers to reach the same result. See also *United Leather Workers* v. *Herkert & Meisel Trunk Co.*, 265 U. S. 457, and see *United States* v. *Frankfort Distilleries*, 324 U. S. 293, 297, where the cases discussed above are distinguished.

The Government has relied heavily upon *Mandeville Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219. But that decision, as did the *Frankfort Distilleries* case, recognized the distinct line of cases I rely upon here as distinguishable from the holding therein. Page 234.

In No. 440, it is alleged that the appellees have prevented and discouraged out-of-state plastering contractors from doing business in the Chicago area by slowdowns, fines on union labor, intimidation, and other means. Assume that such tactics are effective to keep outstate contractors from seeking contracts in the Chicago area. Contracting to plaster a building in Chicago by an outstate contractor is not commerce, even if the contractor did intend to bring his men from outstate, any more than bringing men from one State into another to play baseball is commerce. *Toolson* v. *New York*

Yankees, 346 U. S. 356; *Federal Baseball Club of Baltimore* v. *National League of Professional Baseball Clubs*, 259 U. S. 200, 208. The materials to plaster the building flow without interruption to the building site. There a local labor situation arises that has nothing to do with commerce or any conspiracy to restrain it. That is all that is involved here, and therefore commerce in the sense of that term as used in the Sherman Act is not involved.

I would affirm.